

No. 15396

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a Corporation and WES DURSTON, INC., a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

FEB 15 1957

PAUL P. O'BRIEN, CLERK



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Court of Appeals
for the Ninth Circuit

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Appellant,
vs.
HALTON TRACTOR COMPANY, INC., a Corporation
and WES DURSTON, INC., a Corporation,
Appellees.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Assistant U. S. Attorney General,
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Assistant United States Attorney,
For Appellant.

HENRY M. JONAS,
40 Post Street;
ROY A. SHARFF,
625 Market Street,
San Francisco,
For Appellees.

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United States District Court for the Northern
District of California

Civil Action File No. 32,133

HALTON TRACTOR COMPANY, INC., a Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint al-
leges as its cause of action as follows:

1. That plaintiff, Halton Tractor Company, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Merced, California.
2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the district of Northern California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28, United States Code.
3. That on or about March 15, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A." and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$5,877.97 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff and submitted a document entitled "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit, Lloyd Watson.

8. That said Francis J. Reilly entered upon the business premises of plaintiff without plaintiff's

invitation or approval, pasting a piece of Scotch tape on each of the pieces of equipment, stating "Property of the United States Government" (Notice of Seizure).

9. That plaintiff has repossessed said equipment from Lloyd Watson under its conditional sales contract, said Lloyd Watson having defaulted on his payments under said contract and thereby forfeited any rights, if any he had to such property; and that at the time said Francis J. Reilly demanded and exacted payment from plaintiff, said equipment was no longer in the possession and/or control of said Lloyd Watson; that at no time and under no consideration or theory was plaintiff obligated to pay Social Security taxes for Lloyd Watson's employees nor Lloyd Watson personally.

10. That defendant, United States of America, in the proceedings before the Commissioner of Internal Revenue, conceded that the equipment seized and sought to be distrained by said Francis J. Reilly, was not owned by said Lloyd Watson, its taxpayer, but maintained that defendant, United States of America, was permitted to reach any "equity" of said Lloyd Watson in the hands of a third party, to wit, the plaintiff herein.

11. That plaintiff, while maintaining that at the time the equipment was seized by said Francis J. Reilly, no equity in favor of Lloyd Watson existed, contends that Section 3710 of the Internal Revenue Code protects third parties if "any rights of prop-

erty subject to distress" are sought to be reached by governmental process; that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose "right to property" is sought to be levied.

12. That Section 3710 of Title 28, United States Code, as a prerequisite of a lawful seizure of any rights of property of Lloyd Watson, if any existed, in the hands of a third party, lays down as an immutable rule that:

- (a) a notice of lien (Form 668, Internal Revenue Service) and
- (b) a warrant for distress (Form 69, Internal Revenue Service)

be served at the same time of the levy on the third party, to wit, the plaintiff herein.

13. That plaintiff contends that no such procedure was followed by said Francis J. Reilly, who solely handed to said plaintiff the document marked as "Exhibit B," a copy of which is attached hereto; that said Francis J. Reilly's failure to comply with the provisions of the Internal Revenue Laws and the interpretation given said Section 3710 by the United States courts, made an unlawful seizure, entitling the aggrieved party to at least recover any and all amounts paid under duress of such wrongful act, plus 6% interest per annum, as provided by law, from date of payment.

14. That said Francis J. Reilly, acting as deputy collector for defendant, United States of America,

in making such unlawful seizure, was a trespasser *ab initio*, and the defendant, United States of America, for which he acted in his official capacity, should not benefit from such unlawful and wrongful act by refusing to refund any moneys paid by an innocent third party, the plaintiff herein.

15. That Section 3772 of Title 28 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts, which were "in any manner wrongfully collected"; that nevertheless plaintiff is willing and able to show that a verbal protest was made to said Francis J. Reilly, when he exacted the sum for which suit for refund is filed in this proceeding.

Wherefore, plaintiff demands judgment against the defendants in the sum of \$5,877.97 plus 6% interest per annum from the sum of \$2,000.00 since February 20th, 1948, and for the additional sum of \$3,877.97 from March 15, 1948, together with costs and disbursements of this action.

/s/ HENRY M. JONAS,
Attorney for Plaintiff.

Dated: December 2nd, 1952.

EXHIBIT "A"

Form 843

Treasury Department
Internal Revenue Service
(Revised July, 1947)

Claim

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Refund of Taxes Illegally, Erroneously, or
Excessively Collected

Collector's Stamp: Received Mar. 15, 1950. Collector of Int. Rev., First Dist., Calif.

State of California,
City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps: Halton
Tractor Company, a California Corporation.

Business address: Merced, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

* * *

3. Character of assessment or taxes: Taxes erroneously and illegally collected from Halton Tractor Co.

4. Amount of assessment: \$5,877.97; dates of payment, February 21, 1948, and March 15, 1948.

* * *

6. Amount to be refunded, \$5,877.97, plus interest as provided for by Internal Revenue Code.

* * *

8. The time within which this claim may be legally filed expires, under Section 3313 of Internal Revenue Code, on February 20, 1952, and March 15, 1952, respectively.

The deponent verily believes that this claim should be allowed for the following reasons:

Certain tractors and equipment belonging to Halton Tractor Company, Merced, California, were levied upon by the United States Treasury Department in 1948 for Social Security and Withholding taxes due to the United States Government from a certain Mr. Lloyd Watson, contractor, Los Banos, California. In order to prevent distraint of the property owned by the Halton Tractor Company, the sum of \$5,877.97 was paid to the Collector of Internal Revenue, San Francisco, California, in two checks on February 20, 1948, and March 15, 1948.

Payment of the amount of \$5,877.97 was made in order to prevent the sale of the equipment, although

Halton Tractor Company, a California corporation, was never itself liable for those taxes, inasmuch as Lloyd Watson, a customer of theirs, should have paid those tax obligations.

Under the decisions of Thomas A. Smart vs. U. S., 21 F. (2d) 188, and Grace Parsons v. Anglim, 143 F. (2d) 534, any taxes paid on behalf of another party which were paid involuntarily must be refunded by the U. S. Government, and this deponent verily believes that the claim for refund is absolutely justified.

/s/ EDWARD H. HALTON,
President, Halton Tractor
Company.

Subscribed and sworn to before me this 3rd day of March, 1950.

HENRY M. JONAS,
Notary Public.

EXHIBIT "B"

Lloyd Watson Analysis of Taxes

Kind of Tax	Amt.	Pen.	Int.	Lien	Total
S.S. 4th Qtr., 1946.....	199.96	9.95	8.29		217.19
Applied Balance for S.S. 4th Qtr., 1946....	32.81	1.64	1.35		35.80
W.T. 3/31/47	2,210.36	210.02	101.13	1.00	2,522.51
(Originally \$4,722.51 —reduced by \$2,200.)					
S.S. 3/31/47	719.59	35.98	23.71		779.28
S.S. 6/30/47	277.68	69.42	10.41		357.51
W.T. 6/30/47	1482.20	370.55	55.58		1,908.33
S.S. 9/30/47	45.98	11.50	1.26		58.74
W.T. 9/30/47	248.40	62.10	6.83		317.33
Excise Tax, 1946	122.45	30.61	77.96		161.02
Excise Tax, 1947	1,545.29	77.26	7.73		1,630.28
					7,987.99
					2,200.00
					10,187.99
					2,200.00
					9,987.99
Error					7,987.99
Error					200.00
					7,787.99

[Endorsed]: Filed December 31, 1952.

United States District Court for the Northern
District of California

Civil Action File No. 32,134

WES DURSTON, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint alleges as its cause of action as follows:

1. That plaintiff, Wes Durston, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Los Angeles, California.
2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28 of the United States Code.
3. That on or about February 23rd, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A," and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$3,900.00 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, submitting to them a document entitled, "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff's agent and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit: Lloyd Watson.

United States of America vs.

United States District Court for the Northern
District of California

Civil Action File No. 32,134

WES DURSTON, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff for its complaint alleges as its cause of action as follows:

1. That plaintiff, Wes Durston, Inc., is a corporation, duly organized and existing under the laws of the State of California, maintaining its principal office at Los Angeles, California.
2. That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of California, is no longer in office, and that therefore, suit may be brought against the United States of America, pursuant to Section 1346 of Title 28 of the United States Code.
3. That on or about February 23rd, 1950, plaintiff filed in the Office of the Collector of Internal Revenue at San Francisco, California, its claim for refund, a copy of which is attached hereto, marked "Exhibit A," and incorporated by reference.

4. That this action arises under the laws of the United States for Internal Revenue, and particularly, under Section 3772 of Title 26 of the United States Code.

5. That the claim as filed with the Collector of Internal Revenue was rejected by the Commissioner of Internal Revenue in Washington, D. C., under date of December 15th, 1950, and plaintiff was so notified by registered mail.

6. That plaintiff maintains that the payment of \$3,900.00 paid to the Collector of Internal Revenue was made involuntarily, under duress, and under protest, and that the United States Government is unjustly enriched for said amount, and in the opinion of plaintiff, is bound to repay said sum to plaintiff with the interest as provided for in the Internal Revenue Code.

7. That Francis J. Reilly, deputy collector, approached plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, submitting to them a document entitled, "Lloyd Watson Analysis of Taxes," the original of which showing the handwriting of said Francis J. Reilly, a copy of which is attached hereto, marked "Exhibit B," and incorporated by reference; that said Francis J. Reilly stated to plaintiff's agent and its officers that the only recourse in this matter would be to pay the Internal Revenue Department the sum indicated in this complaint, and then to file a claim for refund for paying the taxes of someone else, to wit: Lloyd Watson.

8. That said Francis J. Reilly entered upon the business premises of plaintiff's agent, Halton Tractor Company, Inc., at Merced, California, without invitation or approval, pasting a piece of Scotch tape on each of the pieces of equipment, stating, "Property of the United States Government" (Notice of Seizure).

9. That plaintiff had repossessed said equipment from Lloyd Watson under its conditional sales contract, said Lloyd Watson having defaulted on his payments under said contract and thereby forfeited any rights, if any he had to such property; and that at the time said Francis J. Reilly demanded and exacted payment from plaintiff and/or plaintiff's agent, respectively, said equipment was no longer in the possession and/or control of said Lloyd Watson; that at no time and under no consideration or theory was plaintiff obligated to pay Social Security Taxes for Lloyd Watson's employees, nor Lloyd Watson personally.

10. That defendant, United States of America, in the proceedings before the Commissioner of Internal Revenue, conceded that the equipment seized and sought to be distrained by said Francis J. Reilly, was not owned by said Lloyd Watson, its taxpayer, but maintained that defendant, United States of America, was permitted to reach any "equity" of said Lloyd Watson in the hands of a third party, to wit: The plaintiff herein.

11. That plaintiff, while maintaining that at the time the equipment was seized by said Francis J.

Reilly, no equity in favor of Lloyd Watson existed, contends that Section 3710 of the Internal Revenue Code protects third parties if "any rights of property subject to distress" are sought to be reached by governmental process; that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose "right to property" is sought to be levied.

12. That Section 3710 of Title 28, United States Code, as a prerequisite of a lawful seizure of any rights of property, if any existed, in the hands of a third party, lays down as an immutable rule that:

- (a) a notice of lien (Form 668 Internal Revenue Service) and
- (b) a warrant for distress (Form 69 Internal Revenue Service)

be served at the same time of the levy on the third party, to wit: The plaintiff herein.

13. That plaintiff contends that no such procedure was followed by said Francis J. Reilly, who solely handed to said plaintiff's agent the document marked as "Exhibit B," a copy of which is attached hereto; that said Francis J. Reilly's failure to comply with the provisions of the Internal Revenue Laws and the interpretation given said Section 3710 by the United States Courts, made an unlawful seizure, entitling the aggrieved party to at least recover any and all amounts paid under duress of such wrongful act, plus 6% interest per annum, as provided by law, from date of payment.

14. That said Francis J. Reilly, acting as deputy collector for defendant, United States of America, in making such unlawful seizure, was a trespasser ab initio, and the defendant, United States of America, for which he acted in his official capacity, should not benefit from such unlawful and wrongful act by refusing to refund any moneys paid by an innocent third party, the plaintiff herein.

15. That Section 3772 of Title 28 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts, which were "in any manner wrongfully collected"; that nevertheless plaintiff is willing and able to show that a verbal protest was made to said Francis J. Reilly, when he exacted the sum for which suit for refund is filed in this proceeding.

Wherefore, plaintiff demands judgment against the defendants in the sum of \$3,900.00 plus 6% interest since March 15th, 1948, together with costs and disbursements of this action.

/s/ HENRY M. JONAS,
Attorney for Plaintiff.

Dated: December 2nd, 1952.

EXHIBIT "A"

Claim

Form 843

**Treasury Department
Internal Revenue Service
(Revised July, 1947)**

**To Be Filed With the Collector Where
Assessment Was Made or Tax Paid**

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

**Refund of Taxes Illegally, Erroneously, or
Excessively Collected**

Collector's Stamp: [Blank.]

**State of California,
City and County of San Francisco—ss.**

**Name of taxpayer or purchaser of stamps: Wes
Durston, Inc.**

Business address: 5547 Valley Boulevard, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

**1. District in which return (if any) was filed:
San Francisco.**

* * *

3. Character of assessment or tax erroneously and illegally collected from West Durston, Inc.

4. Amount of assessment, \$3,900.00; dates of payment, February 23, 1948.

* * *

6. Amount to be refunded, \$3,900.00 plus interest as provided for by Internal Revenue Code.

* * *

8. The time within which this claim may be legally filed expires, under Section 322 b of Internal Revenue Code on February 24th, 1950.

The deponent verily believes that this claim should be allowed for the following reasons:

Certain tractors and equipment belonging to Wes Durston, Inc., Los Angeles, was levied upon by the U. S. Treasury Dept. for Withholding taxes due the U. S. Government from Lloyd Watson, Los Banos, California. In order to prevent distraint an agent of Wes Durston, Inc., to wit: Halton Tractor Company, paid the sum of \$3,900.00 to the Collector of Internal Revenue, San Francisco, California, and informed Wes Durston, Inc., by letter, dated February 23, 1948, of such action.

Wes Durston, Inc., reimbursed their agents, Halton Tractor Company of Merced, Calif., by check No. 1908 on June 30, 1948.

This claim is filed by the authorized agent, Henry M. Jonas, Attorney at Law, 821 Market Street, San Francisco, California, admitted to practice before

the Treasury Dept. on November 18th, 1947, who will submit proper authority from Wes Durston, Inc., in due course. This claim is filed by him, in order to bring it within the two-year period, provided for by Section 322 b Internal Revenue Code. It will be supplemented and legal authorities shall be supplied later on.

/s/ HENRY M. JONAS,
Attorney at Law, 821 Market Street, San Francisco,
Calif., on Behalf of Wes Durston, Inc.

Subscribed and sworn to before me this 23rd day
of February, 1950.

/s/ RUTH W. GROSS,
Deputy Coll.

[The attached Exhibit B is identical to Exhibit B
attached to the Complaint, Cause No. 32133.]

[Endorsed]: Filed December 31, 1952.

[Title of District Court and Cause.]

Civil Action No. 32133

ANSWER

The defendant, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, for its answer to the complaint in the above-entitled action, denies all allegations of the complaint not hereafter expressly admitted or qualified. In further answer to the complaint, the defendant alleges as follows:

1. The defendant admits the allegations of paragraph 1 of the complaint.
2. The defendant admits the allegations of paragraph 2 of the complaint.
3. The defendant admits that on or about March 15, 1950, plaintiff filed a claim for refund in the Office of the Collector of Internal Revenue at San Francisco, California, and that Exhibit A attached to and made a part of the complaint is a true copy of that claim for refund, but denies any statement or allegation in said claim for refund not otherwise expressly admitted herein.
4. The defendant admits that this action arises under the laws of the United States for internal revenue, and particularly under Section 3772 of Title 26 of the United States Code.
5. The defendant admits the allegations of paragraph 5 of the complaint.
6. The defendant denies the allegations of paragraph 6 of the complaint.
7. The defendant denies the allegations of paragraph 7, except that it is admitted that Francis J. Reilly, deputy collector, gave to plaintiff a document entitled, "Lloyd Watson Analysis of Taxes," and that Exhibit B of the complaint represents a copy of said document.
8. The defendant denies the allegations of paragraph 8, except that it is admitted that said Francis J. Reilly pasted a piece of Scotch tape on each of

said pieces of equipment, stating, "Property of the United States Government."

9. The defendant denies the allegations of paragraph 9, except that it is admitted that plaintiff claimed some interest in the equipment under its conditional sales contract and that plaintiff claimed that Lloyd Watson had defaulted on his payments under said contract. It is alleged that on September 14, 1947, and prior to the time that plaintiff had regained possession of said equipment, tax liens were filed and made a matter of record at the Merced County Courthouse. It is further alleged that prior to the time that plaintiff regained possession of the equipment, plaintiff of its own volition and at its suggestion, contracted and agreed with said Francis J. Reilly to pay the tax due from Lloyd Watson in consideration for which said Francis J. Reilly agreed to refrain from seizing and selling said equipment. It is further admitted that at the time that plaintiff actually paid the taxes, said equipment was no longer in the possession of Lloyd Watson.

10. The defendant denies the allegations of paragraph 10, except that it is admitted that the United States of America in the proceedings before the Commissioner of Internal Revenue conceded that legal title to said equipment was not held by said Lloyd Watson, but maintained that the United States of America was entitled to reach any equitable interest in the equipment belonging to said Lloyd Watson.

11. The defendant denies the allegations of paragraph 11 of the complaint that no equity in favor of Lloyd Watson existed at the time the equipment was seized by said Francis J. Reilly. The defendant believes that the allegations of paragraph 11 of the complaint that Section 3710 of the Internal Revenue Code protects third parties if any rights of property subject to distress are sought to be reached by governmental process and that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose right to property is sought to be levied are allegations of law which the defendant is not required to answer and any attempt to admit or deny those allegations would be an invasion of the province of this Court.

12. The defendant believes that the allegations of paragraph 12 of the complaint are allegations of law which the defendant is not required to answer, and attempt to admit or deny those allegations would be an invasion of the province of this Court.

13. The defendant denies the allegations of paragraph 13 of the complaint, except that it is admitted that said Francis J. Reilly did not serve a notice of lien or a warrant of distress upon plaintiff. It is further admitted that said Francis J. Reilly handed to plaintiff a document, a copy of which is made Exhibit B of the complaint.

14. The defendant denies the allegations of paragraph 14 of the complaint.

15. The defendant denies the allegations of para-

graph 15 of the complaint, except that it is admitted that Section 3772 of Title 26 of the United States Code provides that no protest need have been made nor any duress shown to maintain an action on any amounts which were in any manner wrongfully collected.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements.

/s/ **LLOYD H. BURKE,**
United States Attorney.

Certificate of Service attached.

[Endorsed]: Filed June 12, 1953.

[Title of District Court and Cause.]

Civil Action No. 32134

ANSWER

The defendant, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, for its answer to the complaint in the above-entitled action, denies each and every allegation of the complaint not hereinafter expressly admitted or qualified. In further answer to the complaint:

1. The defendant admits the allegations of paragraph 1 of the complaint.
2. The defendant admits the allegations of paragraph 2 of the complaint.

3. The defendant admits that on or about February 23, 1950, plaintiff filed a claim for refund in the Office of the Collector of Internal Revenue at San Francisco, California, and that "Exhibit A" attached to and made a part of the complaint is a true copy of that claim for refund, but denies any statement or allegation in said claim for refund not otherwise expressly admitted herein.

4. The defendant admits that this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

5. The defendant admits the allegations of paragraph 5 of the complaint.

6. The defendant denies the allegations of paragraph 6 of the complaint.

7. The defendant is without knowledge or information as to whether Halton Tractor Company, Inc., is, or was, plaintiff's agent. The remaining allegations of paragraph 7 of the complaint are denied, except that it is admitted that Francis J. Reilly, Deputy Collector, gave to Halton Tractor Company, Inc., a document entitled, "Lloyd Watson Analysis of Taxes," and that "Exhibit B" of the complaint represents a copy of said document.

8. The defendant denies the allegations of paragraph 8 of the complaint, except that it is admitted that said Francis J. Reilly pasted a piece of Scotch tape on certain pieces of equipment, stating, "Property of the United States Government."

9. The defendant denies the allegations of paragraph 9 of the complaint, except that it is admitted that plaintiff claimed some interest in the equipment under its conditional sales contract and that plaintiff claimed that Lloyd Watson had defaulted on his payments under said contract. It is alleged that on September 14, 1947, and prior to the time that plaintiff had regained possession of said equipment, notices of tax liens were filed and made a matter of record in Merced County, California. It is further alleged that prior to the time that plaintiff regained possession of the equipment, plaintiff of its own volition and at its suggestion, contracted and agreed with said Francis J. Reilly to pay the tax due from Lloyd Watson in consideration for which said Francis J. Reilly agreed to refrain from seizing and selling said equipment. It is admitted that at the time that plaintiff actually paid the taxes, said equipment was no longer in the possession of Lloyd Watson.

10. The defendant denies the allegations of paragraph 10 of the complaint, except that it is admitted that in certain proceedings before Officers of the Internal Revenue Service it was conceded that legal title to said equipment was not held by said Lloyd Watson, but it was maintained that the United States was entitled to reach any equitable interest in the equipment belonging to said Lloyd Watson.

11. The defendant denies the allegations of paragraph 11 of the complaint that no equity in favor of Lloyd Watson existed at the time the equipment

was seized by said Francis J. Reilly. The defendant believes that the allegations of paragraph 11 of the complaint that Section 3710 of the Internal Revenue Code protects third parties if any rights of property subject to distress are sought to be reached by governmental process and that the rights of the Internal Revenue Collector rise no higher than those of the taxpayer whose right to property is sought to be levied are allegations of law which the defendant is not required to answer and any attempt to admit or deny those allegations would be an invasion of the province of this Court.

12. The defendant believes that the allegations of paragraph 12 of the complaint are allegations of law which the defendant is not required to answer, and any attempt to admit or deny these allegations would be an invasion of the province of this court.

13. The defendant denies the allegations of paragraph 13 of the complaint, except that it is admitted that said Francis J. Reilly did not serve a notice of lien or a warrant of distress upon plaintiff. It is further admitted that said Francis J. Reilly handed to Halton Tractor Company, Inc., a document, a copy of which is made "Exhibit B" of the complaint.

14. The defendant denies the allegations of paragraph 14 of the complaint, except that it is admitted that Section 3772 of Title 26 of the United States Code provides that no protest need have been made

nor any duress shown to maintain an action on any amounts which were in any manner wrongfully collected.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements.

/s/ LLOYD H. BURKE,
United States Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

WRITTEN INTERROGATORIES PROPOUNDED TO PLAINTIFF BY DEFENDANT

To: Plaintiff Halton Tractor Company, Inc., and
to Henry M. Jonas, Esq., its attorney:

Defendant United States of America propounds the following interrogatories to be answered by a duly authorized officer of plaintiff, under oath, within 15 days after the service hereof:

1. List each and every item of equipment, by serial number or other identification, which you claim was erroneously seized by Francis J. Reilly, Deputy Collector of Internal Revenue.

2. Do you base your claim of ownership of any of the chattels listed in response to interrogatory

1 upon a conditional sales contract? If so, attach a copy of that contract to your answer.

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

4. If the answers to interrogatories 2 and 3 are "no," upon what is your claim of ownership based of the chattels listed in response to interrogatory 1? What price did you pay for the chattels?

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(a) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(b) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

6. As to each chattel listed in response to interrogatory 1, state the following:

(a) Whether or not you are still in possession of the chattel.

(b) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Dated: January 20, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Defendant.

Affidavit of Mail attached.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

Civil No. 32134

WRITTEN INTERROGATORIES PRO-
POUNDED TO PLAINTIFF BY DEFEND-
ANT

To: Plaintiff Wes Durston, Inc., and to Henry M.
Jonas, Esq., its attorney:

Defendant United States of America propounds
the following interrogatories to be answered by a
duly authorized officer of plaintiff, under oath,
within 15 days after the service hereof:

1. List each and every item of equipment, by
serial number or other identification, which you
claim was erroneously seized by Francis J. Reilly,
Deputy Collector of Internal Revenue.
2. Do you base your claim of ownership of any
of the chattels listed in response to interrogatory 1

upon a conditional sales contract? If so, attach a copy of that contract to your answer.

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

4. If the answers to interrogatories 2 and 3 are "no," upon what is your claim of ownership based of the chattels listed in response to interrogatory 1? What price did you pay for the chattels?

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(a) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(b) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

6. As to each chattel listed in response to interrogatory 1, state the following:

(a) Whether or not you are still in possession of the chattel.

(b) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Dated: January 26, 1955.

LLOYD H. BURKE,
United States Attorney;

By /s/ GEORGE A. BLACKSTONE,
Assistant United States Attorney, Attorneys for
Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

Civil No. 32133

ANSWER TO WRITTEN INTERROGATORIES PROPOUNDED BY DEFENDANT

Comes now Edward H. Halton, President of Halton Tractor Company, Inc., a corporation, and answering the interrogatories propounded herein, sets forth as follows:

1. List each and every item of equipment, by serial number or other identification, which you claim was erroneously seized by Francis J. Reilly, Deputy Collector of Internal Revenue.

The foregoing question uses the word "seized." By answering this question, plaintiff does not admit that the same was legally or actually seized in the usual and common usage of the word or in accord-

ance with law. The fact is that Francis J. Reilly, as Deputy Collector of Internal Revenue, pasted a piece of paper upon the following pieces of equipment, upon each of which was written, "Property of United States Government":

6 DW10 Caterpillar tractors, bearing serial numbers IN-2581, IN-2582, IN-2167, IN-2172, IN-2791 and IN-2792, with 6 La Plante-Choate scrapers, numbers 566, 568, 145, 136, 430 and 425; that there was also in the possession of Halton Tractor Company 1 Chevrolet 6 5-passenger coupe, 1942 Fleetline, Engine No. BA 46673, Serial No. 6 BH 09-1801;

Ford V8 Pickup truck, Engine No. 699C-839050, Serial No. 699C-839050, in which Lloyd Watson had an interest; I informed said Francis J. Reilly of the fact that sales had been arranged for the said automobiles and Mr. Reilly refrained from attaching the same slips of paper upon them when I promised him that the proceeds from the sale of the same would be turned over to Mr. Reilly.

2. Do you base your claim of ownership of any of the chattels listed in response to interrogatory 1 upon a conditional sales contract? If so, attach a copy of that contract to your answer.

Yes. (See photostatic copy attached hereto.)

3. Do you base your claim of ownership to any of the chattels listed in response to interrogatory 1 upon a chattel mortgage? If so, attach a copy of the chattel mortgage to your answer.

Yes. (See copy attached hereto.)

5. At the time of the alleged unlawful seizure by Francis J. Reilly of the chattels listed in response to interrogatory 1, state:

(A) The total amount unpaid under your conditional sales contract, if any, relating to those chattels.

(B) The total amount unpaid under your chattel mortgage, if any, relating to those chattels.

With the qualification made in answering interrogatory No. 1, the amount due under the conditional sales contract on January 31, 1948, was \$14,945.84 and the amount due under the chattel mortgage was \$23,562.27.

6. As to each chattel listed in response to interrogatory 1, state the following:

(A) Whether or not you are still in possession of the chattel.

No.

(B) Whether or not you have sold the chattel since the date of the alleged wrongful seizure of the chattel by Francis J. Reilly; and if such sale has been made, state the sales price, name and address of purchaser and date of sale.

Item	Sales Price	Purchaser	Date of Sale
DW10 #IN2581 and			
CW-10 Scraper #425.....	\$10,500.00	Murrietta Farms	3/9/48
DW10 #IN2583 and		Rt. 1, Box 40,	
CW-10 Scraper #430.....	10,500.00	Firebaugh	3/9/48
CW-10 Scraper #136.....	2,250.00	Budd & Quinn	5/26/48
	.	P.O. Box 1786, Fresno	
DW10 #IN2173	4,500.00	Santa Fe Rock &	8/23/48
		Gravel, 922 J St.,	
		Modesto	
DW10 #IN2792 and		Harold Utentmill	12/30/48
CW-10 Scraper #566	11,150.31	8th and P Sts.,	
		Mendota, Calif.	
DW10 #IN2167 and		Harold Utentmill	12/30/48
CW-10 Scraper #145	5,131.03	8th and P Sts.,	
		Mendota, Calif.	
DW10 #IN2791 and		Harold Utentmill	12/30/48
CW-10 Scraper #568.....	9,572.53	8th and P Sts.,	
		Mendota, Calif.	
1946 Ford Pickup	1,000.00	McAuley Motors	2/6/48
1942 Chev. Coupe.....	1,200.00	744 W. 17th St.,	2/6/48
		Merced	

/s/ E. H. HALTON.

Duly verified.

35

Shipped - - - - - .19 Order No. 8 - -

HALTON TRACTOR COMPANY, a partnership, of MERCED, CALIFORNIA, hereinafter known as the COMPANY, agrees to sell

hereinafter known as the PURCHASER agrees to buy

2 - Cans	Tutor 1N2791 + 1N2792	25.950,10
2 - La Plant - Cans	1N2791 + 516 - 518	
		446,65
		24496,35
	Paid in	627,25
		20.219,00

hereinafter known and described as "Equipment," for which the Purchaser agrees to pay in Lawful Money of the United States of America, to HALTON TRACTOR COMPANY, at its office, Merced, California, a total purchase price Twenty - six thousand
Two hundred and nine and one-half DOLLARS 36,496.50

Fair 6277M

Property in trade valued at _____ \$ _____

and the balance of said purchase price
on 20 July 1896

As Follows: ~~Settlement and payment shall commence every six weeks \$112.00 per day.~~
~~June 1st, 1947, one payment \$1094.25 November 1st 1948.~~

with interest on deferred payments at the rate of _____ per cent per annum from _____ to maturity and _____

This sale is made subject to the following conditions to-wit:

1. The title to said Equipment shall remain wholly and exclusively in the Company, or its assigns, until the full amount of the purchase price, together with any costs, expenses, and attorneys fees for the collection thereof have been fully paid in cash when same shall become vested in the Purchaser.

2. The giving or acceptance of any promissory note on account of the purchase price shall have no effect upon the title to the Equipment, but only

3 No transfer, renewal, extension, or amendment of this contract by any interest thereunder, or loss, injury, or destruction of said equipment shall release the Purchaser from his obligation hereunder, any gas, gas oil, and Company shall be entitled to all the rights and Company hereunder.

4. Said Purchaser shall pay to Company all expenses and charges incurred by Company in connection with the manufacture of said equipment, and shall pay to Company the amount of all taxes, fees, and expenses imposed upon or levied against such equipment.

Equipment to the State to which the same may be shipped by the Company without consent of the Company has had and shall have a writing. Purchaser shall produce and exhibit to said Company or its Agent any or all of said Equipment at any time. Purchaser agrees that any alterations, added to and equipment improvements made theron, or replacements thereof shall become a component part of said Equipment and shall inure to the benefit of and

5. Upon default by any party of any payment or other obligation due hereunder, the Purchaser may proceed to collect on the part of the Purchaser or in the event of bankruptcy or insolvency of the Company, to bring suit against the Purchaser or its officers, managers or agents for the benefit of creditors, or to "cancel" his debt to the Purchaser, or to do whatever is necessary to collect the sum due him.

any such sale the Company shall deduct all expenses for removing and selling such Equipment including a reasonable attorney's fee and shall credit the balance to the amount due and remaining unpaid from the Purchaser and any surplus above such amount shall be paid over to the Purchaser and if the proceeds from such sole sale after deducting expenses shall not be sufficient to pay the remaining amount of the contract price the Purchaser shall pay so I debt accrued until payment.

For the purpose of retaking the Equipment under the contract, the Company may enter upon the premises where said Equipment may be, and remove the same.

F. In the event that suit is instituted by said Company to enforce any of its rights hereunder, said Purchaser agrees to pay an attorney's fee of 10% plus \$25.00 in the event suit is for the collection of any payment hereunder, and in the event suit is brought for any other purpose, such reasonable attorney's fees as shall be fixed by the Court.

7 Said Company shall have the right to employ one or more remedies hereunder successively or concurrently and such action shall not operate to bar or prevent said Company from pursuing any other remedy which it may have under and any repossessing or re-taking or sale of said equipment pursuant to the terms hereof shall not operate to release and Purchaser until full payment of all amounts due hereunder she shall have been paid in cash.

10-47 - *Spurred*

Company and Purchaser must sign Original and Duplicate, and each should require the surrender and cancellation of both signed documents before signing any other contract affecting this

HALTON TRACTOR COMPANY

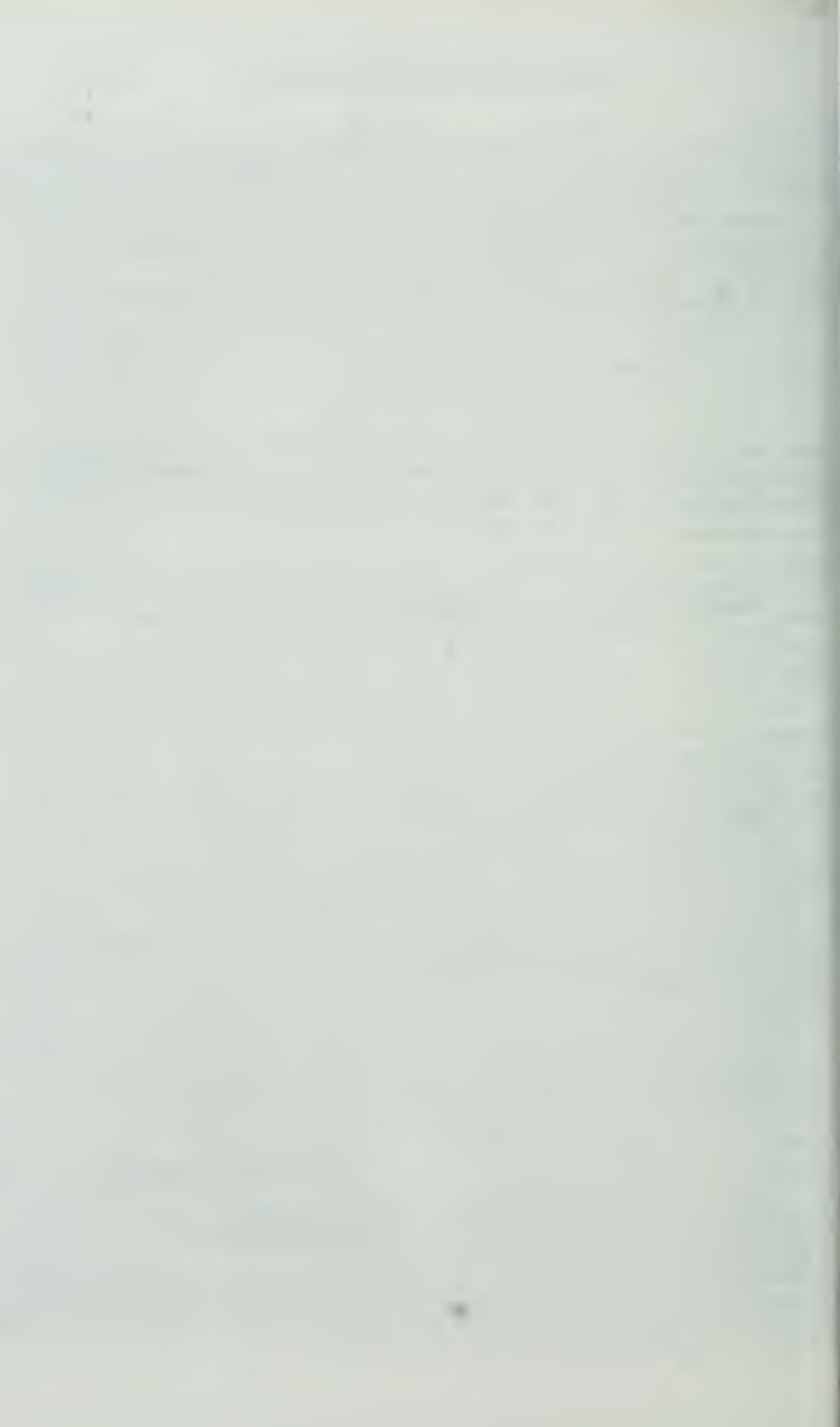
B. 2000

Address of Purchaser

Item	Sales Price	Purchaser	Date of Sale
DW10 #IN2581 and CW-10 Scraper #425.....	\$10,500.00	Murrietta Farms	3/9/48
DW10 #IN2583 and CW-10 Scraper #430.....	10,500.00	Rt. 1, Box 40, Firebaugh	3/9/48
CW-10 Scraper #136.....	2,250.00	Budd & Quinn P.O. Box 1786, Fresno	5/26/48
DW10 #IN2173	4,500.00	Santa Fe Rock & Gravel, 922 J St., Modesto	8/23/48
DW10 #IN2792 and CW-10 Scraper #566	11,150.31	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2167 and CW-10 Scraper #145	5,131.03	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
DW10 #IN2791 and CW-10 Scraper #568.....	9,572.53	Harold Utenmill 8th and P Sts., Mendota, Calif.	12/30/48
1946 Ford Pickup	1,000.00	McAuley Motors	2/6/48
1942 Chev. Coupe.....	1,200.00	744 W. 17th St., Merced	2/6/48

/s/ E. H. HALTON.

Duly verified.



Mortgage of Chattels

Symbol No. 5 336

This Mortgage made this 24th day of March, 1947, by Lloyd Watson, 338 K Street of Los Banos, State of California, by occupation Contractor, Mortgagor, to The Morris Plan Company of California, a California corporation, by occupation Industrial Loan Company, Mortgagee,

Witnesseth:

1. The said Mortgagor hereby mortgage to the said Mortgagee all of that certain personal property described as follows, to wit:

In accordance with Schedule "A" attached hereto and hereby made a part of this chattel mortgage.

Schedule "A"

Attached to and hereby made a part of that certain chattel mortgage by Lloyd Watson, 338 K Street, Los Banos, California, to the Morris Plan Company of California, 715 Market Street, San Francisco, California, dated March 24, 1947.

2 D8 Caterpillar Tractors, Serial Nos. IH-3676 and IH-2509.

4 DW10 Caterpillar Tractors, Serial Nos. IN-2581, IN-2582, IN-2167, IN-2173.

1 LeTourneau Carryall, Serial No. FRS-26269-FP-B.

1 LeTourneau Model F.P. Carryall, Serial No. S-26270-FP-B.

1 Woolridge Carryall, Model T.C.R., Serial No. S573.

4 LaPlant Choate Carryall, Serial Nos. CW10430, CW10-425, CW10-145, CW10-136.

2 LeTourneau Double Drum Power Control Unit, Serial Nos. 9R1034, P6596-R8C.

1 LeTourneau Power Control Unit, Model TA, Serial No. P6959TA.

1 Southwest Rooter (3 Standard), Serial No. 11607.

1 Model XD8 Soule Straight Dozer, Ser. No. IS-155.

As security for (A) the payment to the Mortgagee of Forty-seven Thousand One Hundred and no/100 Dollars (\$47,100) at an agreed rate of charge of \$3,587.00; and in event of prepayment or default of more than 15 days, interest, charges, collection costs and attorney fees at the highest rate allowed by the Industrial Loan Act, according to the terms of a certain promissory note of even date herewith executed and delivered by mortgagor unto mortgagee and any renewals thereof; and

(B) The payment of any further sums of money which may hereafter be loaned or advanced by mortgagee unto mortgagor not to exceed the maximum amount of \$40,000.00, such maximum amount being only the limit of the debts, sums, expenditures, indebtedness and obligations that may be secured hereby at any one time and does not

include such as may have been repaid or discharged hereunder; and

(C) The payment to the mortgagee of all other moneys that are now or may become due and payable unto mortgagee from mortgagor.

2. Mortgagor hereby warrants that he is the owner and in possession of all the aforesaid personal property, and that the same is free and clear of all liens and encumbrances.

Mortgagor Promises and Agrees

3. That he will pay all sums secured hereby, and fully perform all covenants herein contained.

4. That he will not dispose of said personal property, nor permit any liens to be placed thereon, nor allow the same to be taken from his custody or control, nor remove the same without the written consent of the mortgagee.

5. That all additions, accretions, improvements and repairs to said personal property or any part thereof shall immediately become subject to all of the provisions of this mortgage and be bound by the lien thereof.

6. That he will not allow said personal property to be in any way injured or damaged, but shall keep it in good repair, all at his own expense, reasonable wear and tear excepted.

7. That he will not use nor permit said personal property to be used for hire, unless endorsed hereon in writing; nor shall he use or allow said

personal property to be used for an illegal purpose.

8. That he will keep said personal property insured against loss at his own expense in such companies as mortgagee approves with the loss payable unto mortgagee, for an amount equal to the aggregate sum unpaid hereunder. The policy of insurance shall be delivered to the mortgagee, who will hold it until all of the terms and conditions of this mortgage have been fully met. Should the mortgagor fail to deliver the policy of insurance to the mortgagee upon the signing and delivery of this contract, the mortgagee is authorized to insure said personal property as is herein provided. The moneys so expended shall be immediately due and payable from mortgagor to mortgagee, payment thereof being secured by this mortgage.

Proceeds of any insurance, whether paid by reason of loss, injury or return of premium, shall be used toward replacement of said personal property or payment of mortgagor's obligation hereunder as mortgagee may elect. Mortgagee may collect, compromise, receipt for, or discharge on such terms as it may deem advisable, any claim for insurance for loss, destruction or theft of said personal property, or damage thereto, however caused, to which the mortgagor may have any right, claim or interest.

9. That he will pay, prior to their becoming delinquent, any taxes, liens, repairs, storage, handling and other charges or assessments which may be levied or accrue against said personal property;

and in the event of his failure to do so, mortgagee is authorized to pay them, and the moneys so expended shall be immediately due and payable from mortgagor to mortgagee in the maximum amount allowed by law, payment thereof being secured by this mortgage.

10. That he will pay, in the event this mortgage is referred to an attorney for any action whatsoever, an attorney fee, together with all court costs and expenses of whatsoever nature, kind or description incurred by the mortgagee in the maximum amount allowed by law.

It Is Mutually Agreed

11. If the mortgagor shall fail to make payment of any part of the principal or interest as provided in the promissory note secured hereby, or if any breach be made of the terms and conditions of said promissory note or any obligation herein contained, then the whole principal sum unpaid on said promissory note, with interest accrued thereon, together with all other sums due and owing, payment of which is secured hereunder, shall immediately become due and payable at the option of the mortgagee. Mortgagee shall thereupon be entitled to immediate possession of all of said personal property, or any part thereof, and it may at once proceed to foreclose this mortgage in accordance with the provisions of the Code of Civil Procedure of the State of California; or it may at its option take possession of said personal property according to law and take such measures as it may deem necessary and

proper for the protection thereof, and whether or not possession has been taken, sell said personal property, or any part thereof, as a pledge or otherwise at a public or private sale, after there shall have been mailed at least five days written notice to the mortgagor at his last known address of the time, date and place of said sale, and reimburse itself from the proceeds of sale, in the maximum amount allowed by law, for all costs and charges incurred or expended by it, including specifically all attorney fees, applying the balance of moneys received from said sale toward the payment of all sums due mortgagee and secured hereby, and dispose of any remaining funds as provided by law.

12. In any sale made hereunder mortgagor expressly waives demand for performance and notice of the time and place of said sale, except as herein-before provided; agrees that said property need not be at the place of said sale, and consents that the mortgagee shall have the right to bid upon and purchase all or any part of said personal property at any sale so held hereunder. In any Bill of Sale executed upon a sale of said personal property as herein provided, the recital of the amount of the indebtedness, default, posting of notices of sale, sale and purchase price shall be conclusive proof thereof. Upon delivery of such a Bill of Sale, the purchaser or purchasers shall be entitled to immediate possession of the personal property thereby sold.

13. If during the existence of this mortgage there be commenced or pending any suit, action or

proceeding affecting said personal property or any part thereof, or if any adverse claim for or against said personal property or any part thereof be made or asserted, then the mortgagee may appear in such suit, action or proceeding and retain counsel therein and defend the same or otherwise take such action therein as it may deem advisable and may settle or compromise the same or any adverse claim; and for any of such purposes, it may expend such sums of money as it may deem necessary. The moneys so expended shall be immediately due and payable from mortgagor to mortgagee, to the maximum allowed by law, payment thereof being secured by this mortgage.

14. Mortgagee may at any time, without notice, release any part of said personal property from the lien of this mortgage without affecting the personal liability of any person on the note secured hereby. Such release shall not affect the lien of this mortgage upon the residue of said personal property.

15. This agreement is binding upon the heirs, executors, administrators, assigns or successors in interest of the whole or any part of the personal property herein mortgaged, and each party hereto.

16. Time is expressly of the essence hereof; and it is specifically agreed that no waiver by the mortgagee of any breach or default of or by the mortgagors of the terms and conditions of this mortgage or the note hereby secured shall be deemed a waiver of any breach or default thereafter occurring.

17. This mortgage secures an obligation entered into under the provisions of the Industrial Loan Act of this State and all charges whether interest, attorney fees or whatsoever contracted for herein are subject to and shall not exceed the maximum charge allowed by that act.

In Witness Whereof, the mortgagor has hereunto set his hand the day and year first above written.

LLOYD WATSON.

State of California,
City and County of San Francisco—ss.

On this 24th day of March, 1947, before me, E. J. Casey, a Notary Public in and for said County and State, residing therein, duly commissioned and qualified, personally appeared Lloyd Watson personally known to me to be the person described in and whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Oct. 9, 1947.

Recorded at request of The Morris Plan Company at 9:00 a.m., Vol. 857, Official Records, Pg. 229, March 29, 1947; Merced County Records.

W. T. WHITE,
Recorder;

ELLEN LATOUR,
Deputy Recorder.

2.50 Pd. Folie 21. Copied 7. Indexed 2. Compared 3/4.

State of California,
County of Merced—ss.

I, S. E. Acker, County Recorder of the County of Merced, State of California, do hereby certify that I have compared the foregoing copy of Mortgage of Chattels with the original record of same Vol. 857 of Official Records at Page 229 in my office, and that the same is a correct transcript therefrom and of the whole thereof.

Witness my hand and official seal, this 18th day of November, 1953.

[Seal] S. E. ACKER,
 County Recorder;
 By ELSIE ARREAGA,
 Deputy Recorder.

Receipt of copy acknowledged.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Causes.]

Nos. 32133 and 32134

MEMORANDUM FOR JUDGMENT

The basic issue in these consolidated cases is Whether the plaintiffs were coerced into paying to the Government taxes owed by a third party. Acting on behalf of the Halton Tractor Company and Wes Durston, Inc., Edward H. Halton paid social security and withholding taxes that were owed to the Federal Government by Lloyd Watson; the defendant claims that Halton was a volunteer.

Lloyd Watson used certain tractors and equipment in the operation of his contracting business. During 1947 Watson encountered financial difficulties, and on September 16, 1947, the Government filed a lien against Watson's property for unpaid taxes. Watson's tractors and equipment were either encumbered by a chattel mortgage, or sold to him under a conditional sales contract, which were in existence prior to the government lien. After the lien was filed Halton paid off a mortgage secured by some of Watson's equipment, and Durston bought a conditional sale contract covering some more of Watson's equipment, thereby acquiring the security position of Watson's mortgagee and conditional vendor. Watson agreed that Halton should repair and resell the equipment covered by the mortgage and conditional sale contract, and that Watson's equity would be applied to the purchase of new equipment. In January of 1948, before the equip-

ment was repaired and resold, Halton had some conversations with Francis J. Reilly, an agent of the Internal Revenue Service.

Reilly told Halton about the Government lien on Watson's equipment, saying that it was superior to any interest that Halton or Durston had in that equipment; he also told Halton that the Government could seize the equipment and sell it at a forced sale. The proceeds of a forced sale would have been much less than the amount eventually realized when Halton did repair the equipment and sold it over a period of a year. Reilly believed that the Government could require the proceeds of any sale to be applied first to Watson's tax liability, and he convinced Halton of this proposition. The actual legal effect of a rather complex series of security transactions which led up to the acquisition by Halton and Durston of their interests in Watson's equipment, was that Halton and Durston succeeded to the rights of their predecessors, and therefore the Government lien was inferior to plaintiffs' interests; but it was reasonable for Halton to believe otherwise, because of the complexity of the preceding transactions and because Reilly, the agent of the Government, emphatically told him that the Government lien had priority. Furthermore Reilly taped labels on the equipment which bore the words "Property of the United States Government."

Acting under his belief that the Government could force a sale of Watson's equipment in its un-repaired condition, and could insist that proceeds of

a sale be applied first to Watson's tax liability, Halton paid the taxes in question, acting on behalf of both plaintiffs. Plaintiffs contend here that they paid Watson's taxes under duress of goods; that is, that they paid the taxes because they believed it was the only way they could have saved their interest in the equipment from seizure and sale by the Government. A good definition of duress is referred to in *Weir v. McGrath*, S.D. Ohio, 52 F.2d 201 202-203:

"In the case of *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409, the court says: 'To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.' "

This doctrine is particularly applicable to the facts of the case at bar: here the plaintiffs reasonably believed that the Government possessed a power over their property from which they had no means of immediate relief other than by making the payment demanded by the Government's agent. It is a conclusion of this Court that the Government lien was actually inferior to plaintiffs' interests in Watson's equipment, and that the Government could only have sold Watson's equity in the equipment.

Therefore the seizure and sale threatened by the Government's agent constituted a threat of unlawful Government action. In *Robertson v. Frank Brothers Company*, 132 U. S. 17, 23, a case in which an importer paid an unlawfully assessed duty in order to avoid a heavy penalty and to get immediate possession of his perishable goods, the Court made the following instructive comments on the nature of duress:

"The ultimate fact * * * was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. * * * When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required * * *"

See also *Stahmann v. Vidal*, 305 U. S. 61, 66, and *Atchison, etc., Ry. Co. v. O'Connor*, 223 U. S. 280.

In the case at bar the Government's agent put labels on the equipment indicating that they were the property of the United States. He also insisted to Halton that Halton would have to pay Watson's taxes before Halton would be permitted to repair and resell the equipment. Halton had paid \$25,-930.00 for his interest in Watson's equipment and Durston had paid \$30,100.00 for his interest. Watson's tax liability was in the amount of \$7,777.97. If the equipment had been sold all at once at a

forced sale in its unrepaired condition, and if the Government could have insisted that the proceeds of such a sale be applied first to the discharge of the tax liability, Halton and Durston would have suffered very heavy losses. In view of these facts it is the opinion and conclusion of this Court that plaintiffs paid Watson's taxes under duress, since they acted under an immediate and urgent necessity to prevent a seizure of their property. These facts indicate that plaintiffs had no donative intent when they paid Watson's taxes. Our Court of Appeals said in *Parsons v. Anglim*, 9th Cir., 143 F.2d 534, 537:

"* * * it is obvious that it is the volition of intent to donate which is determinative, not the absence of coercion in the mere act of handing the moneys to the Collector along with the protest that he does not owe it." (Emphasis by the Court of Appeals.)

Defendant raises a procedural point. Defendant contends that this Court cannot consider the Government lien inferior to Halton's interest in the equipment because in order to prove the priority of his interest, Halton must rely upon a document (a chattel mortgage formerly held by the Morris Plan) that was not brought to the attention of the Commissioner in connection with the administrative claim for refund of the taxes in question. But the letter in which the Commissioner informed Halton that his claim for refund was disallowed, recognizes that Halton (as the Halton Tractor Company) had title to some of the equipment; that Watson had

only an equity in that equipment; and that the Government's lien could apply only to Watson's equity in the equipment. Therefore there is nothing to the contention that the Commissioner was deprived of the opportunity to consider the claim for refund from the standpoint of Halton's interest being superior or prior to that of the Government.

Defendant also contends that when Halton repaired and resold Watson's equipment, the net proceeds from selling the equipment were greater than the amounts owed by Watson on the equipment, and that therefore Watson did have an equity which was subject to the Government lien. Watson owed Durston (Wes Durston, Inc.), \$30,-100.00 and Durston realized \$30,500.00 on the resale of the equipment in which he had an interest; but Durston paid out over \$1,000 for parts and repairs before selling that equipment. Thus Watson would not have been entitled to any payment whatever from the proceeds of the sale and there was nothing to which the Government lien could apply. Watson owed Halton \$44,596.10 including interest and taxes paid by Halton on Watson's account; Halton spent \$6,517.37 for repairing equipment he sold. The total of these two figures is \$51,113.47. Halton received \$57,807.97 as the proceeds of selling the equipment. When the amount owed to Halton and the amount Halton spent in repairs are deducted from the proceeds of the sale, that leaves \$6,694.50, which might be referred to as the gross profit from the sale of the equipment. The several documents which evidence Halton's security interest

in the equipment in question all provide that Halton is entitled to be reimbursed for the expenses involved in the repossession and resale of the equipment. Halton has claimed various items of expense, some of which are challenged by the defendant as unjustified. It is not necessary for this Court to pass upon the validity of all of the items claimed because at least one of them is justifiable, and it amounts to \$7,931.25, which is sufficient in itself to wipe out any profit from the resale of the equipment. This item is termed "sales department operating expenses," and was arrived at by allocating to the sale of Watson's equipment a portion of the annual cost of running Halton's used equipment sales department, according to the ratio which the proceeds of the sale of Watson's equipment bore to the total used equipment sales for that year. Therefore this Court finds as a matter of fact that Watson was not entitled to have any of the proceeds of the resale of the equipment paid to him, and that neither plaintiff received anything of Watson's that the Government could reach.

Judgment is awarded to plaintiffs as prayed for. Counsel for plaintiffs shall prepare and present findings of fact, conclusions of law and a judgment in accordance herewith.

Dated: June 5, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

No. 32133

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, judge of the above-entitled court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the court. Counsel for the parties to this cause submitted written briefs and arguments on behalf of their respective clients, and the cause being submitted to this court for decision, the court does hereby find the following as the facts:

Findings of Fact

I.

That the plaintiff, Halton Tractor Company, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, maintaining its principal office at Merced, California.

II.

That James G. Smyth, the former Collector of Internal Revenue for the United States of America

for the District of Northern California, is no longer in office, and that therefore suit may be brought against the United States of America pursuant to Section 1346 of Title 28, United States Code.

III.

That this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

IV.

That at the times involved in this action one Lloyd H. Watson was indebted to the United States of America for Social Security and withholding taxes. That at certain of the times hereinafter referred to, said Lloyd H. Watson was the purchaser under a conditional sales contract and the mortgagor of certain tractors, earth-moving machinery and equipment used in connection therewith. That said conditional sales contract was between the plaintiff Halton Tractor Company as vendor, and said Lloyd H. Watson as vendee, and the Morris Plan Company of San Francisco, California, was the mortgagee in said chattel mortgage, but at the time of the acts of one Francis J. Reilly, hereinafter referred to, plaintiff was the owner of the said chattel mortgage as well as the said conditional sales contract. That at the time of the acts of said Francis J. Reilly hereinafter referred to said Lloyd H. Watson had defaulted in the making of the payments due under the promissory note secured by said chattel mortgage and otherwise breached the terms and condi-

tions of said chattel mortgage and also the payments due under said conditional sales contract were in default; that therefore the said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.

V.

That on or about the end of the month of January, 1948, said Francis J. Reilly as a deputy collector of the Department of Internal Revenue, attached to said machinery and equipment a notice, as follows: "Property of the United States Government (Notice of Seizure)"; thereby said Francis J. Reilly purported to seize said machinery and equipment as the property of said Lloyd H. Watson, and thereupon said Francis J. Reilly informed plaintiff that he intended to, and he threatened to, proceed to sell said machinery and equipment to satisfy said indebtedness of said Lloyd H. Watson to the United States of America.

VI.

That the said Francis J. Reilly informed plaintiff that all its rights in and to the said machinery and equipment were inferior and secondary to the rights of the United States of America to sell said machinery and equipment and apply the proceeds of such sale first to the said indebtedness of said Lloyd H. Watson to the defendant United States of America, and informed plaintiff he could and would proceed with the sale of said property unless plain-

tiff paid the taxes due from said Lloyd H. Watson to defendant United States of America; and that plaintiff believed from the statements and acts of said Francis J. Reilly that its rights under said chattel mortgage and said conditional sales agreement in and to said property were inferior and secondary to the rights of the United States of America, and therefore to save itself from financial loss and to prevent the sale and the loss of said machinery and equipment to it, plaintiff paid the sum of \$2,000 to the defendant United States of America on the 20th day of February, 1948, and a sum of \$3,877.97 on the 15th day of March, 1948, in partial satisfaction of said taxes due from Lloyd H. Watson. That at all times prior to the payment of said sums of money by plaintiff to defendant it believed that if said Francis J. Reilly proceeded to sell said equipment, as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff.

VII.

That said Francis J. Reilly, at said times prior to the payment of said sums of money by plaintiff to the defendant, informed plaintiff, and plaintiff believed that the only method by which plaintiff could proceed to protect its rights in the situation was by paying to the Department of Internal Revenue the amount of said taxes due from said Lloyd H. Watson and then file a claim for refund from the United States of America upon the ground it

had paid the taxes due from someone else, to wit: Lloyd H. Watson.

VIII.

That on or about the 15th day of March, 1950, plaintiff filed in the office of the Collector of Internal Revenue at San Francisco, California, its claim for refund of the said sums of money, a true copy of which said claim is attached to the complaint of plaintiff hereto marked Exhibit A and incorporated herein by reference. That the defendant in the proceedings before the Commissioner of Internal Revenue upon said claim conceded that the machinery and equipment which said Francis J. Reilly attempted to seize and distrain was not owned by the said Lloyd H. Watson, but that he had only an equity therein and admitted that plaintiff had an interest therein; that said Commissioner of Internal Revenue rejected said claim upon the ground that because said Lloyd H. Watson had an equity in said machinery and equipment the sale thereof as threatened by said Francis J. Reilly could only sell his equity and that therefore said payments by plaintiff were voluntary and plaintiff had no right to recover the same; and that the said claim was rejected by the Collector of Internal Revenue under date of December 15, 1950, and plaintiff was so notified by registered mail.

IX.

That after paying said sums to the United States of America plaintiff repaired and reconditioned said machinery and equipment and sold the same in the

regular course of its business, but that the proceeds from the sale of the same were insufficient to reimburse plaintiff for the moneys due and chargeable under the said chattel mortgage, the said conditional sales contract, and the costs of repairing, reconditioning and reselling said machinery and equipment so that plaintiff did not recover from the sale of said machinery and equipment any part of the said moneys paid to the United States of America.

And from the foregoing Findings of Fact the Court does conclude as follows:

Conclusions of Law

1. That the plaintiff Halton Tractor Company paid the sum of \$5,877.97 to the United States of America under duress.
2. That the said claim filed by the plaintiff was upon the same ground that plaintiff asserted as the basis of its rights to recover in this case, and the Commissioner of Internal Revenue was sufficiently apprised of the facts constituting the claim of plaintiff to allow the Commissioner to consider and pass upon the said claim of plaintiff for refund of said moneys paid to defendant.
3. That the plaintiff is entitled to recover judgment against the United States of America for the sum of \$5,877.97 plus interest thereon at the rate of 6% per annum on the sum of \$2,000 from February 20, 1948, and interest at the rate of 6% per annum on the sum of \$3,877.97 from March 15,

1948, together with costs and disbursements of this action.

Let judgment be entered accordingly in favor of plaintiff and for its costs of suit incurred herein.

Dated this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged July 11, 1956.

[Endorsed]: Filed July 30, 1956.

[Title of District Court and Cause.]

No. 32134

Findings of Fact and
Conclusions of Law

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, judge of the above-entitled court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of the plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the court. Counsel for the parties to this cause sub-

mitted written briefs and arguments on behalf of their respective clients, and the cause being submitted to this court for decision, the court does hereby find the following as the facts:

Findings of Fact

I.

That the plaintiff, Wes Durston, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of California, maintaining its principal office at Los Angeles, California.

II.

That James G. Smyth, the former Collector of Internal Revenue for the United States of America for the District of Northern California, is no longer in office, and that therefore suit may be brought against the United States of America pursuant to Section 1346 of Title 28, United States Code.

III.

That this action arises under the laws of the United States for Internal Revenue, and particularly under Section 3772 of Title 26 of the United States Code.

IV.

That at the times involved in this action one Lloyd H. Watson was indebted to the United States of America for Social Security and withholding taxes. That at certain of the times hereinafter referred to said Lloyd H. Watson was the purchaser

under a conditional sales contract of certain tractors, earth-moving machinery and equipment used in connection therewith. That at all times herein mentioned the plaintiff was the real owner of the said conditional sales agreement. That at the time of the acts of one Francis J. Reilly, hereinafter referred to, said Lloyd H. Watson had defaulted in the payments due under said conditional sales agreement and therefore said Lloyd H. Watson had surrendered all said machinery and equipment to plaintiff; and that all said equipment was at said time in the possession of plaintiff and not in the possession of said Lloyd H. Watson.

V.

That on or about the end of the month of January, 1948, said Francis J. Reilly as a deputy collector of the Department of Internal Revenue, attached to said machinery and equipment a notice, as follows: "Property of the United States Government (Notice of Seizure)"; thereby said Francis J. Reilly purported to seize said machinery and equipment as the property of said Lloyd H. Watson, and thereupon said Francis J. Reilly informed plaintiff that he intended to, and he threatened to, proceed to sell said machinery and equipment to satisfy said indebtedness of said Lloyd H. Watson to the United States of America.

VI.

That the said Francis J. Reilly informed plaintiff that all its rights in and to the said machinery

and equipment were inferior and secondary to the rights of the United States of America to sell said machinery and equipment and apply the proceeds of such sale first to the said indebtedness of said Lloyd H. Watson to the defendant United States of America, and informed plaintiff he could and would proceed with the sale of said property unless plaintiff paid the taxes due from said Lloyd H. Watson to defendant United States of America; and that plaintiff believed from the statements and acts of said Francis J. Reilly that its rights under said conditional sales agreement in and to said property were inferior and secondary to the rights of the United States of America, and therefore to save itself from financial loss and to prevent the sale and the loss of said machinery and equipment to it, plaintiff paid the sum of \$3,900 to the defendant United States of America on the 23rd day of February, 1948, in partial satisfaction of said taxes due from Lloyd H. Watson.

VII.

That at all times prior to and at the time of the payment of said sum of money by plaintiff to defendant, it believed that if said Francis J. Reilly proceeded to sell said equipment as he threatened, the same would be taken from the possession of plaintiff by the purchasers at such sale and forever lost to plaintiff.

VIII.

That said Francis J. Reilly, at said times prior to the payment of said sums of money by plaintiff to

the defendant, informed plaintiff, and plaintiff believed that the only method by which plaintiff could proceed to protect its rights in the situation was by paying to the Department of Internal Revenue the amount of said taxes due from said Lloyd H. Watson and then file a claim for refund from the United States of America upon the ground it had paid the taxes due from someone else, to wit: Lloyd H. Watson.

IX.

That on or about the 15th day of March, 1950, plaintiff filed in the office of the Collector of Internal Revenue at San Francisco, California, its claim for refund of the said sums of money, a true copy of which said claim is attached to the complaint of plaintiff hereto, marked Exhibit A, and incorporated herein by reference. That the defendant in the proceedings before the Commissioner of Internal Revenue upon said claim conceded that the machinery and equipment which said Francis J. Reilly attempted to seize and distrain was not owned by the said Lloyd H. Watson, but that he had only an equity therein and admitted that plaintiff had an interest therein; that said Commissioner of Internal Revenue rejected said claim upon the ground that because the said Lloyd H. Watson had an equity in said machinery and equipment and the sale thereof as threatened by said Francis J. Reilly could only sell his equity and that therefore said payments by plaintiff were voluntary and plaintiff had no right to recover the same; and that the said claim was rejected by the

Collector of Internal Revenue under date of December 15, 1950, and plaintiff was so notified by registered mail.

X.

That after paying said sums to the United States of America plaintiff repaired and reconditioned said machinery and equipment and sold the same in the regular course of its business, but that the proceeds from the sale of the same were insufficient to reimburse plaintiff for the moneys due and chargeable under the said conditional sales contract and the costs of repairing, reconditioning and reselling said machinery and equipment so that plaintiff did not recover from the sale of said machinery and equipment any part of the said moneys paid to the United States of America.

From the foregoing Findings of Fact the court does conclude as follows:

Conclusions of Law

1. That the plaintiff Wes Durston, Inc., paid the sum of \$3,900 to the United States of America under duress.
2. That the said claim filed by the plaintiff was upon the same ground that plaintiff asserted as the basis of its rights to recover in this case and the Commissioner of Internal Revenue was sufficiently apprised of the facts constituting the claim of plaintiff to allow the Commissioner to consider and pass upon the said claim of plaintiff for refund of said moneys paid to defendant.

3. That the plaintiff is entitled to recover judgment against the United States of America for the sum of \$3,900 plus interest thereon at the rate of 6% per annum from the 23d day of February, 1948, together with costs and disbursements of this action.

Let judgment be entered accordingly in favor of plaintiff and for its costs of suit incurred herein.

Dated this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged July 11, 1956.

[Endorsed]: Filed July 30, 1956.

In the United States District Court for the Northern
District of California, Southern Division

No. 32133

HALTON TRACTOR COMPANY, INC., a Cor-
poration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, Judge

of the above-entitled Court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the Court, and the Court being fully advised in the premises, and having filed herein its Findings of fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America, in the sum of \$5,877.97, with interest thereon at the rate of 6% per annum on the sum of \$2,000.00 from February 20, 1948, and interest at the rate of 6% per annum on the sum of \$3,877.97 from March 13, 1948, together with costs of suit herein.

Done in Open Court this 30th day of July, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

Lodged July 26, 1956.

[Endorsed]: Filed and entered July 30, 1956.

In the United States District Court for the Northern
District of California, Southern Division
No. 32134

WES DURSTON, INC., a Corporation,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Oliver J. Carter, Judge of the above-entitled Court, on the 9th and 10th days of March, 1955. Plaintiff appeared by its attorneys, Henry M. Jonas and Roy A. Sharff, and defendant appeared by its attorneys, Lloyd H. Burke and George A. Blackstone. The cause proceeded to trial upon the complaint of plaintiff and the answer of the defendant thereto, and evidence both oral and documentary was offered and received by the Court, and the Court being fully advised in the premises, and having filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff have judgment against the defendant, United States of America in the sum of \$3900.00, with interest thereon at six per cent (6%)

per annum from the 23rd day of February, 1948,
until paid, together with costs of suit herein.

Done in Open Court this 30th day of July, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

Lodged July 26, 1956.

[Endorsed]: Filed and entered July 30, 1956.

[Title of District Court and Causes.]

Civil Nos. 32133 and 32134

NOTICE OF APPEAL

You Are Hereby Notified that the defendant,
United States of America appeals to the United
States Court of Appeals for the Ninth Circuit from
the judgments entered on July 30, 1956, in the above
actions.

Dated: September 24, 1956.

LLOYD H. BURKE,

United States Attorney;

By /s/ MARVIN D. MORGENSTEIN,
Assistant U. S. Attorney.

[Endorsed]: Filed September 24, 1956.

[Title of District Court and Causes.]

Civil Nos. 32133, 32134

ORDER

Upon ex parte application and good cause having
been shown,

It Is Hereby Ordered that the defendant, United States of America, shall have to and including December 13, 1956, in which to docket the appeals filed in the above-entitled actions.

Dated: October 30, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed October 30, 1956.

In the United States District Court for the Northern District of California, Southern Division

Nos. 32133, 32134

HALTON TRACTOR COMPANY, a Corporation,
and DURSTON TRACTOR COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Oliver D. Carter, Judge.

REPORTER'S TRANSCRIPT

March 9-10, 1955

Appearances:

For the Plaintiffs:

ROY A. SHARFF, ESQ.,
HENRY JONAS, ESQ.

For the Defendant:

LLOYD H. BURKE,

United States Attorney, by

GEORGE A. BLACKSTONE, ESQ.,

Assistant United States Attorney.

The Clerk: Halton Tractor Company vs. the United States of America; Durston, Inc., vs. the United States of America, for trial.

Mr. Blackstone: Ready for the defendant, your Honor.

Mr. Sharff: Ready for the plaintiff.

The Court: Are these cases consolidated as of yet or are they going to be joint trials? What is the expectation of counsel as to how we proceed in these matters?

Mr. Sharff: Joint trial, your Honor. The evidence in the Halton case and the Durston case in some particulars are the same. The Court would have to hear the duplication of the same testimony. And then, of course, at a certain point they split; but up to a certain point it's common evidence and common testimony, common witnesses.

The Court: Is there any objection to consolidating them for trial?

Mr. Blackstone: No. I think they should be consolidated, your Honor. I don't know if there is any distinct order consolidating them for trial.

The Court: I use the term advisedly because there may be some case where you could proceed together, but I think the order should be made con-

solidating them for trial. We will make the order consolidating them for trial.

The second thing I want to ask is I notice that in the Halton case that written interrogatories were propounded and [3*] answers were given, but that in the Durston case written interrogatories were propounded but I don't know that answers have been filed.

Mr. Sharff: Answers have not been filed, your Honor. However, I have supplied the information requested by the interrogatories to Mr. Blackstone as fast as it was possible to ascertain it to find the information requested in it.

The Court: Is there any problem in that, Mr. Blackstone?

Mr. Blackstone: No, your Honor. As far as I am concerned, I think Mr. Sharff has acted in perfectly good faith. And that although the information we wanted wasn't supplied, I think it's simply because it wasn't available. So we are not going to make any point of that.

Mr. Sharff: We are faced with this problem, your Honor, in respect to Mr. Durston's answers. Mr. Durston liquidated his business in Los Angeles in 1951. His records were stored. His bookkeeper died last July, his brother died in January of this year. They were both with him in the business. He is under great handicap at finding any of the records. It was not until yesterday, in fact, that we were able to supply some of the figures to Mr. Blackstone, which I did.

The Court: Well, are there going to be any contested issues over records in this case?

Mr. Blackstone: There definitely will be. As far as the Halton Tractor Company people is concerned, I don't know [4] what—

The Court: I am talking about the Durston case, I mean, in the difficulty of finding the records. In other words, are we going to have any problems of proof in that situation? If so, I want to know about it in advance.

Mr. Sharff: I don't think so, your Honor. I believe that Mr. Durston's recollection will be sufficient for this trial. If it is desired, there is one record which could be obtained from the C.I.T. Corporation in Los Angeles and there is one individual whom we just located in Los Angeles who might be of some help in the case. But it was very late and he was unwilling to come to San Francisco. So, we are without him. But I do believe we can get through all right, your Honor, without too much difficulty in records.

The Court: How much time would it take to finish this evidence?

Mr. Sharff: I believe it will finish today.

The Court: Do you need the full day to do it?

Mr. Sharff: I believe it will take more than the morning, your Honor. We will be going into the afternoon, I am sure of that.

The Court: What are the contested issues of fact?

Mr. Sharff: As I analyze the proceedings, your Honor, the United States admits our allegations in

both cases, which are the same. They admit the corporate existence of the plaintiffs. [5] They admit that James Smyth, the former Collector of Internal Revenue, is no longer in office and that this suit is therefore brought against the United States in lieu thereof. They admit that the plaintiffs in this case did, within the time set allowed by statute, file their claim for refund of the taxes.

The Court: Well, now, wait a minute. Do they admit that? They admit that a claim for refund was filed on a certain day, but—

Mr. Sharff: Yes.

The Court: But the rest of it is your conclusion.

Mr. Sharff: I am sorry, your Honor; that is correct, your Honor. I am sorry.

The Court: Yes. That may be correct; it may be a correct conclusion, but I don't know that they admit it.

Mr. Sharff: No; they don't, your Honor. And then they admit that this action arises under Section 3772, Title 26, I believe. The complaint said 26—this carbon, I can't tell if it's 26 or 28.

The Court: Yes; I think that is 26.

Mr. Sharff: 26.

The Court: To be sure—

Mr. Sharff: No; I think it is 26.

Mr. Blackstone: That is an error; it's 26, your Honor.

The Court: Then both paragraph 4 of both complaints [6] should be amended to provide that it is Section 3772 of Title 26 instead of Title 28.

Mr. Sharff: Yes. And then the United States Government admits that the claim attached to the complaint was filed with the Internal Revenue Department and that it was rejected by the Commissioner of Internal Revenue on December 15th, 1950. And, of course, your Honor, we filed within the two years thereafter allowed by statute.

From there on, your Honor, I believe the only other issue upon which we are agreed is the fact that the payment of money by the Halton Tractor Company to the United States Government, in which respect, too, we have certain original sets right here in the courtroom to present to the court—

The Court: Well, they admit payment and they admit that the Government agent filed certain notices?

Mr. Sharff: Yes; they do admit that, your Honor.

The Court: And I don't want any proof of those factors except as they may go to some other element of the case. I don't want to rehash anything that is admitted in this case.

Mr. Sharff: We'll present our case as briefly as possible. And I might say, your Honor, if your Honor desires an opening statement from me, I can briefly outline—

The Court: I want to know what you deem to be the contested issues here so I can follow it up.

Mr. Sharff: The contested issues will be, as I understand [7] it from the pleadings, the existence of the conditional sales agreement claimed by the Halton Tractor Company.

The Court: When you say, "the conditional sales agreement," what do you mean?

Mr. Sharff: A conditional sales agreement dated April.

The Court: There are two types of security transactions, one was a—two types of conditional transactions—

Mr. Sharff: There are two types of transactions involved, your Honor. One was a conditional sales agreement, the original of which I have here, a copy of which has been supplied to Mr. Blackstone, dated April 19th, 1947, under which Halton Tractor Company sold to Lloyd Watson—Lloyd Watson. I don't know, your Honor, under it is the taxpayer really involved in this case?

The Court: I understand that.

Mr. Sharff: Yes. And it covered two Caterpillar D-W 10 tractors together with two LaPlant Choate scrapers. That is a conditional sales agreement held by the Halton Tractor Company.

The other security claimed by the Halton Tractor Company is a mortgage of chattels dated the 24th day of March from Lloyd Watson to Morris Plan Company of San Francisco.

The Court: What is the date of that again?

Mr. Sharff: March 24th, 1947. Now, here it may be proper for me to inform the court that Halton Tractor Company [8] claims under the Morris Plan mortgage, on the basis of equitable subrogation, having paid to the Morris Plan at the request of Mr. Watson the balance due thereon and the original

mortgage having been delivered to the Halton Tractor Company and never released—

The Court: Claims under the Morris Plan mortgage?

Mr. Sharff: Yes; under the rule of equitable subrogation, your Honor. I believe that rule is so well established—

The Court: Is that appropriately pleaded?

Mr. Sharff: Well, now, your Honor raises a question I hadn't considered.

Mr. Blackstone: May it please the court—

The Court: Does the Government make any point of it?

Mr. Blackstone: Yes, your Honor. There is no allegation in the complaint whatsoever about a chattel mortgage. We discovered from the answers to interrogatories that although the pleadings suggest that the claimed interest of the plaintiff, Halton Tractor Company, is under the conditional sales agreement, that in response to our request for answers to interrogatories they stated that they have two instruments under which they are claiming the conditional sales agreement as outlined by Mr. Sharff, and a chattel mortgage dated March 24th, 1947, this one he is just now stating, but—

The Court: Well, under the Federal Rules of Civil [9] Procedure which permit what has sometimes been characterized as notice pleadings, does the Government make any point that the issue hasn't been appropriately pleaded? In other words, if they have not been given notice of the claim of the plaintiff in this case—

Mr. Sharff: They were informed by the written interrogatories under—

The Court: I understand that. I am asking the Government if he makes any point of it, if the Government makes any point of it at this time because then if there is a problem I want you—

Mr. Sharff: Yes, your Honor. If there is a point, of course, I will make the appropriate motion to amend at the time.

The Court: Under state pleadings, I would conclude that you probably would have to plead it.

Mr. Sharff: Yes; I believe so, your Honor.

The Court: But under the Federal Rules of Civil Procedure, which are considerably broader in that respect, I am not so sure that you have to plead it so long as you satisfactorily have notified the Government of the nature of your claim.

Mr. Sharff: Yes.

The Court: And so that the Government has the opportunity to defend against it. [10]

Mr. Sharff: And I believe, also, your Honor, we have pleaded that the taxes were wrongfully collected. Probably that is sufficient under the Federal Rules. I just don't know how liberal they are. I don't believe we ever will know until time goes on and on.

The Court: I am inclined to think you are correct on it. But I just raise the point unless there is an argument about it.

Mr. Blackstone: I am in an embarrassing position, your Honor. It does not particularly reflect credit on me. We had previously obtained from the

County Recorder in Merced County a copy of the chattel mortgage dated October 2nd, 1947, executed by Lloyd Watson to Halton Tractor. So that I did know heretofore that they had a chattel mortgage on the property. And when I received—it was not until this very minute that I realized that the mortgage that they submitted in their answers to interrogatories was not this mortgage that I had a photostat of for the County Recorder.

I have been proceeding under the assumption that their claim insofar as the chattels covered by the mortgage is concerned, is the mortgage of October 2nd, 1947, which was not recorded until October 7th, 1947, but—

Mr. Sharff: Pardon me, Mr. Blackstone. Don't you remember taking the deposition of the Morris Plan on a mortgage? [11]

Mr. Blackstone: That is correct, I remember that.

Mr. Sharff: And the Morris Plan mortgage was brought to your attention early last fall?

The Court: Well—

Mr. Sharff: I thought I made a claim to your office the other day. I told you about the Morris Plan issue because it was claimed because of Mr. Halton.

The Court: Are you making any claim under the chattel mortgage, which is mentioned by Mr. Blackstone?

Mr. Sharff: No, your Honor; because that mortgage was after the Government's lien was recorded.

It would therefore be later in time. We would gather no rights under it. However——

The Court: The Government has the position, as I understand it, that their lien attached.

Mr. Sharff: On September 15th, I believe, or 16th.

Mr. Blackstone: September 16th, your Honor.

The Court: Is there any dispute as to that fact?

Mr. Sharff: No; there isn't, your Honor.

The Court: You are claiming then under the right of equitable subrogation to the Morris Plan mortgage having purchased the equitable interest of Morris Plan, is that correct?

Mr. Sharff: That is correct, your Honor, having paid the sum of \$27,930 to the Morris Plan. [12]

The Court: And is there going to be any problem of any subsequent negotiations between the plaintiff here, that is, Halton, and the taxpayer?

Mr. Sharff: No, your Honor; no problem.

The Court: In merging any of these documents or any of these interests and things of that sort?

Mr. Sharff: No, your Honor. I don't believe we will have any problems on that score whatsoever.

The Court: All right. Well, now, do I take it that your contention is that the contested issue is the existence of and the validity of these two documents, the conditional sales contract and the chattel mortgage?

Mr. Sharff: That is two of the contested issues. The other contested issue, and I presume the two other matters on which we will devote most of our evidence, your Honor, will cover the issue of the

exact conversations and circumstances between Mr. Francis J. Reilly, the representative of the United States Department of Internal Revenue, and Mr. Halton, and the circumstances and reasons under which Mr. Halton of the Halton Tractor Company paid this money to the United States Government.

The Court: Well, now, without previously deciding the matter, are those conversations admissible here, and if so, under what theory are they?

Mr. Sharff: They are admissible, your Honor, to show [13] duress of goods, that these payments were not voluntary and were not donations.

The Court: Well, I shouldn't raise the question until we come to it.

Mr. Sharff: I think what is appropriate, your Honor, I would in an opening statement outline to the court so the court might follow, what reasons we are offering this testimony.

The Court: What is the next issue?

Mr. Sharff: The next issue, I presume from my conversation with Mr. Blackstone, will be the matter whether the Halton Tractor Company in the eventual sale and disposition of this property actually suffered a loss over their claims against Mr. Watson, the taxpayer. I believe I correctly state one of the issues which will come in this case.

In other words, I believe that Mr. Blackstone, for the defendant, will contend that Halton Tractor Company did not suffer any loss as a final result of this transaction. I have already supplied Mr. Blackstone with a great deal of figures involved in this transaction already.

The Court: I noticed the answer to the written interrogatories. Are you going to concede that that is an issue? I mean, are you going to take the position that that is a material subject to discussion?

Mr. Sharff: In view of the fact—I believe, your Honor, [14] that it comes into the case on behalf of the defendants and I am prepared to meet it.

The Court: I understand that. But are you going to—the only reason I am asking the question is I want to find out if you are going to contest as to whether or not that is an issue.

Mr. Sharff: No; I won't, your Honor. I won't contest that as being an issue, your Honor, because after all I think the court is interested in knowing whether the Halton Tractor Company was actually caused a loss.

The Court: Is it whether they gained or lost, does it make any difference? I thought the issue here was whether or not they had a prior lien which had attached and which was taken possession under a repossession and that the property was the property of Halton and not the property of Watson, and therefore was not subject to tax.

Mr. Sharff: Well, the facts will appear, your Honor, that the property was not repossessed until after the Government lien had been levied.

The Court: Well, that may well be; but are we going to be in an argument as to whether or not there was an equitable interest of Watson, which was taxable?

Mr. Sharff: You mean which could be levied upon?

The Court: Which could be levied upon.

Mr. Sharff: No, your Honor; there is no argument that [15] there was an equitable interest which could be levied upon by the United States Government.

Mr. Blackstone: What do you mean that there is no argument, Mr. Sharff, on that?

Mr. Sharff: That there was an equitable interest.

Mr. Blackstone: That there was an equitable—

Mr. Sharff: That the United States Government should reach by its lien inasmuch as the property was still in the possession of the taxpayer, your Honor.

The Court: That is the point exactly.

Mr. Sharff: Yes.

The Court: In other words, then, the Court does have the problem of determining the extent, if any, of the equitable interest that was subject to being levied upon for purpose of satisfying unpaid taxes?

Mr. Sharff: Yes, your Honor. I think that we can't avoid that problem. I feel it's squarely in front of us in this case.

The Court: All right. And this fourth point goes to that question?

Mr. Sharff: Yes, your Honor. I might say, your Honor, when the complaint was filed we were under the information that the property had already been repossessed at the time the date the lien was filed. We find the facts to be different, though. [16]

The Court: Well, then, you ought to be able to stipulate as to some facts as to when certain things

occurred. It seems to me that if these instruments were recorded—I don't know about a conditional sales contract—but the chattel mortgage was—you should be able to agree on that.

Mr. Sharff: We should be able to.

The Court: You should be able to agree as to the date the government lien attached if it had a lien and when certain notice—

Mr. Sharff: We will stipulate in that regard.

The Court: When certain notices were given and filed and so on.

Mr. Sharff: Yes, your Honor. We would be willing to do that, perfectly willing to do that. Any stipulations along the line which your Honor suggests, we would certainly be willing.

The Court: What I want to do is avoid a lot of testimony.

Mr. Blackstone: May it please the Court, may I make my statement, because I think to me the issues are not complicated. I would like to—

The Court: I would like to hear.

Mr. Blackstone: My analysis—

The Court: Have you concluded?

Mr. Sharff: In regard to Wes Durston, your Honor, I [17] might say the issues will be just as I have outlined, the conditional sales agreement and the circumstances under which the monies were paid and the amount of loss resulting to Wes Durston, Inc. It will be the same three issues in that regard.

The Court: Is there going to be any question raised about what Watson owed, taxes?

Mr. Sharff: No, your Honor.

The Court: Or in excess of the amounts that were collected here?

Mr. Sharff: No, your Honor.

The Court: No question of that?

Mr. Sharff: No question about that.

The Court: All right.

Mr. Blackstone: May it please the Court, we are not going to raise any issue about the conditional sales contract that Halton Tractor Company had with Watson, nor are we going to raise any issue that there was a conditional sales contract that under which West Durston, Inc., was a conditional seller and Watson was a buyer.

In regard to the chattel mortgage, as I explained before, interrupting Mr. Sharff, it is perhaps negligence on my part, but I, in preparing for the trial, had in mind that they were claiming their interest in some of the chattels under the chattel mortgage dated October 7th, 1947. And I [18] do now recall the deposition that we had. And I remember a statement to Mr. Jonas at that time that I didn't see any necessity in his going into such an elaborate way of qualifying that there was a chattel mortgage; that if he had one, a certified copy from the Recorder's Office would be admissible and his office would prove it, and that we wouldn't raise any issue about that. So if they are prepared to introduce a certified copy of that chattel mortgage that the Morris Plan had and then tie it in with their evidence, that certainly I don't intend to make any further objection; in fact, I don't think I would be in any legal position to do so.

The way I see the case, it comes down to this: That is that there were taxes outstanding assessed against Lloyd Watson. We had a tax lien on file as early as September 16th, 1947. Mr. Reilly, who is a deputy collector of Internal Revenue, after the tax lien was filed, he was making an attempt to collect the taxes from Watson.

The Court: The tax lien was filed what date?

Mr. Blackstone: September 16th, 1947. Prior to that time he had warrants of restraint in his possession and he had contacted Watson on numerous occasions to attempt to collect payment. In fact, as early as August 23rd, I believe it was, 1947, Watson had furnished him with the net worth statement showing total assets and so forth. [19]

After the tax lien was filed, Mr. Reilly, for the first time, was informed or found out that there was a chattel mortgage of record in which Halton Tractor claimed some interest in this property. A conference ensued some time in October or early November of 1947 in Mr. Halton's office in which Mr. Halton agreed with Mr. Reilly that if the property that was subject to the equitable interests of the Halton Tractor Company were taken back by Halton Tractor and sold, Halton Tractor would discharge the entire outstanding taxes owing to the Government by Watson.

Mr. Reilly, before agreeing to that, checked with the Collector in San Francisco. He was given verbal authority to agree to that procedure.

And our main contention in this case is that there was a voluntary oral agreement that the Halton

Tractor Company would sell the property, that the Government would not exercise its right of restraint and sale, and that before any sale would be made by Halton Tractor, they would first discharge the total tax liability of Watson. As far as the Government is concerned, that is all that happened. Certainly the cases are perfectly clear that where a person agrees gratuitously to discharge another person's taxes, he can't thereafter upset the transaction. So that is our primary defense and I think the evidence will sustain that.

Secondly, we do maintain that in the event the sale of [20] the chattels by Halton Tractor Company resulted in more than enough money to discharge the equitable interest in the property of the Halton Tractor people, plus the full amount of the taxes due with some excess—and so our contention is in the event even if there had been no such agreement with the deputy collector, the plaintiffs have not been injured.

Now may I just say a word in regard to the Wes Durston aspect of the case. Mr. Reilly had no dealings whatsoever with the Wes Durston Company. All of his conversations were with Halton; and as far as he knew, Halton was the only one claiming any kind of interest in this equipment other than Watson; and whatever arrangements were made between Halton Tractor Company and Wes Durston are really of no concern to the Government because the whole thing had been handled with Mr. Halton. And this is just after acquired knowledge on our part that there was some independent agreement

between them. But we believe when the evidence is in, your Honor, that those issues will be made clear to you.

The Court: What was the second issue? I want to get it clear. The first one was that Halton had voluntarily agreed to pay if no restraint was—

Mr. Blackstone: Yes. And secondly, even apart from that, Halton Tractor realizes—I think it appears from the answers to the interrogatories—that the sale price that they sold this equipment for exceeded the indebtedness to [21] them from Watson by \$17,545.76. That appears in their answers to written interrogatories. The total tax that Watson owed that was paid by Halton Tractor was nine thousand some odd dollars. So that in effect they came out with something like \$7,000 excess over and beyond their indebtedness from Lloyd Watson. So we think clearly that is an issue.

But we have, in other words, two strings to our bow. We think if the first issue is decided as we think it should be, in light of what the evidence will be, that there was a perfectly clear agreement to discharge the tax liability of Lloyd Watson, and whether or not that turned out to be a losing proposition wouldn't make any difference. But we say further going beyond that that the actual facts show that they came out ahead on the transaction.

The Court: Well, Mr. Blackstone, do I take it it's your position here that as to the conditional sales contract or as to the chattel mortgage there was no determination of such as repossession under

the respective contracts so as to cut off the equitable interests of Mr. Watson?

Mr. Blackstone: No, your Honor, that had not been done. I think Mr. Sharff has conceded that at that time that this conversation occurred between Mr. Reilly and Mr. Watson we would have to concede. And I think our answer is that the legal title under the conditional sales agreement, the legal title was in Halton Tractor. And we now discover part of the [22] equipment, the legal title, was in Wes Durston's. But they had not exercised their right of repossession. They had not cut off the equitable interest of Lloyd Watson. And I think that background helps explain the arrangement that was made between Mr. Reilly and Mr. Halton about how these taxes would be paid and who would sell the equipment.

The Court: All right, proceed.

Mr. Sharff: Is it permissible to remain at the table while we go on, your Honor?

The Court: Yes.

Mr. Sharff: Mr. Halton, please.

EDWARD H. HALTON

a plaintiff herein, was called in his own behalf; sworn.

The Clerk: State your full name for the Court and record.

The Witness: Edward H. Halton.

Direct Examination

By Mr. Sharff:

Q. Where do you reside, Mr. Halton?

A. In Merced, California.

Q. What is your occupation?

A. I am the president of the Halton Tractor Company, a California corporation.

Q. What is the nature and type of their business, Mr. Halton?

A. We are the distributors for the Caterpillar Tractor Company and the John Deere Plow Company and other allied lines. [23]

Q. Do you handle both new and second-hand equipment? A. Yes, we do.

Q. Where are your places of business?

A. Our principal place of business is in Merced. We have a store at Los Banos and a store at Chowchilla.

Q. As part of that business, did you have also a repair shop which you do repair work for the general public?

A. Yes, repair shop and repair parts.

Q. All right. Now do you know one Lloyd Watson?

(Testimony of Edward H. Halton.)

A. Yes. We have done business with Lloyd Watson for a number of years.

Q. And had you known him for a couple of years, known him prior to 1947? A. Yes.

Q. All right. Now what was Mr. Watson's business?

A. Mr. Watson was first a land-leveling contractor and later became a bonded licensed contractor.

The Court: When you say a licensed contractor, you mean general contractor?

A. General contractor, yes, sir.

Q. (By Mr. Sharff): Now, Mr. Halton, in April of 1947 did you have a transaction with Mr. Watson, Mr. Lloyd Watson, concerning certain equipment?

A. Yes. We entered into a conditional sales contract to sell Mr. Watson two Caterpillar D-W 10 tractors and scrapers, [24] both were second hand.

The Court: When was that?

A. In April of 1947.

The Court: All right.

Q. (By Mr. Sharff): I ask you if this is a true copy of the conditional sales contract, Mr. Halton?

A. Yes, it is.

Q. Can you identify the signatures thereon?

A. Yes. This is mine, E. H. Halton, here (indicating).

Q. Signing on behalf of the Halton Tractor Company? A. Yes.

Q. And what is the other signature on the line,

(Testimony of Edward H. Halton.)

"Purchaser"? A. Lloyd Watson, Purchaser.

Mr. Sharff: Very well. Does your Honor wish to inspect this document?

The Court: Yes, I do. All right. Mr. Clerk, would you hand this to Mr. Sharff?

Mr. Sharff: We will ask that this be received as Plaintiff's first in order.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 1.

(Whereupon document referred to above, copy of purchase agreement, was received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. (By Mr. Sharff): Mr. Halton, some time later in the year [25] 1947, did you have another transaction with Mr. Watson? A. Yes.

Q. Did you have one concerning a Morris Plan mortgage? A. Yes.

Q. Will you tell us how that transaction was initiated?

A. Yes. Mr. Watson came over to our place of business at Merced and—

Q. Can you fix the approximate time or date of this conversation?

A. In September of 1947, sometime. I cannot tell you the exact date.

Q. All right. And who was present during your conversation, Mr. Halton?

A. Mr. Watson and I were in my office, at our office at Merced.

Q. And will you tell us now the conversation

(Testimony of Edward H. Halton.)

you had with Mr. Watson with reference to the Morris Plan mortgage?

Mr. Blackstone: I will object as calling for hearsay. I don't understand the purpose of that.

The Court: Overrule the objection.

Q. (By Mr. Sharff): Go ahead.

A. Mr. Watson told me, he said that he was delinquent in his payments to the Morris Plan.

The Court: I do that for the reason that you rely upon—you have to rely upon the equity of Mr. Watson, and in [26] effect he is your predecessor in interest in any property rights that the Government has. Therefore these conversations between him and Mr. Halton are material and are not hearsay.

Mr. Blackstone: Yes.

Q. (By Mr. Sharff): That was the basis on which I submitted them, being their predecessor in title.

The Court: You may then proceed.

The Witness: Mr. Watson, as I have said, told me that he was delinquent to the Morris Plan and that the Morris Plan had threatened to foreclose him; and that he had just entered into a job with some people by the name of Erreca, who live in Los Banos and have a very large ranch there, and which job he told me would enable him to pay out the balance due under the mortgage. But they at the time was out of cash, out of funds, and would I help him out by financing or buying the Morris Plan mortgage and entering into another deal with

(Testimony of Edward H. Halton.)

him whereby the payments would be over a longer period of time and in smaller amounts at a time so that he would be able to complete the purchase of this equipment that he was—that he had the loan on from the Morris Plan. This I agreed to do, and—

Q. Now having agreed to do that, Mr. Halton, did you get in touch with the Morris Plan?

A. Yes. [27]

Q. How did you communicate with them?

A. I phoned to the Morris Plan and we made an arrangement with the Morris Plan that they would send their mortgage to the Bank of America, Merced branch, which is the bank that we do business with, and that I would put up the amount of the mortgage with our bank and the bank would handle the exchange of our money to them and the mortgage to us. And this we did.

Q. Can you tell us about when that was done, Mr. Halton?

A. Did you say where and when?

Q. When?

A. Yes. This was done right away shortly after our conversation with Watson.

Mr. Sharff: Mr. Blackstone, do you recall that a date fixed by the Morris Plan was about September 29th in the deposition? If you do, I would ask for a stipulation from you in that regard.

I presume the Court would like the approximate date with a little more certainty?

The Court: Certainly, if you can agree upon the

(Testimony of Edward H. Halton.)

date of the assignment of the Morris Plan mortgage to Halton.

Mr. Sharff: Transfer, your Honor. There was no principal assignment, your Honor.

The Court: All right. Well, whatever transfer there was. [28]

Mr. Sharff: Yes.

The Court: All I am interested in is when it took place, if there was—

Mr. Blackstone: I want to preserve my position, your Honor, insofar as there is testimony here as to an oral assignment. At this point I haven't researched whether or not a mortgage had been assigned, verbally or not. I am not sure, but if there is, I do preserve the position of the Government. I will object to the testimony of an oral assignment. And in the absence of any written assignment, I would ask testimony in that regard be stricken.

The Witness: Well, I paid \$25,900.

The Court: Just a moment, Mr. Halton. I am trying to get what you are trying to stipulate—what you are asking for a stipulation to.

Mr. Sharff: I am asking for a stipulation for the date that the Halton Tractor Company paid the money to the Morris Plan was about September 29th, 1947.

The Court: That is another thing. Without any stipulating as to—without naming any stipulation as to what the legal effect of that was, just that the fact that Mr. Halton paid through his bank to the

(Testimony of Edward H. Halton.)

Morris Plan the amount of money mentioned by Mr. Sharff on the particular date—

Mr. Blackstone: There was a statement made at the deposition of Mr. E. E. McIntyre, credit manager of Morris [29] Plan Company, that the records of the company in his possession carried a notation of September 29th, 1947, currently as the date that certain documents relating to that chattel mortgage were delivered to the Bank of America. So I would stipulate.

The Court: And the money was paid by the Bank of America for Mr. Halton to the Morris Plan?

Mr. Blackstone: Yes, I would stipulate to that.

The Court: And how much was the amount of money?

Mr. Sharff: \$25,930, your Honor. We can produce the original check if it is desired, but the stipulation—

The Court: Will you stipulate that that amount of money was paid, \$25,930?

Mr. Blackstone: That amount was paid by Mr. Halton—

Mr. Sharff: From the Halton Tractor Company to the Morris Plan. I also have a letter setting that forth.

Mr. Blackstone: I will stipulate to that.

The Court: That is subject to confirmation. If there are any problems on it, why, I will permit you to move to withdraw from the stipulation if ,

(Testimony of Edward H. Halton.)

date of the assignment of the Morris Plan mortgage to Halton.

Mr. Sharff: Transfer, your Honor. There was no principal assignment, your Honor.

The Court: All right. Well, whatever transfer there was. [28]

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The Court: That is subject to confirmation. If there are any problems on it, why, I will permit you to move to withdraw from the stipulation if

(Testimony of Edward H. Halton.)

further proof is needed and that will be stipulated to then?

Q. (By Mr. Sharff): Mr. Halton, I think you told us you received the original mortgage then from the Morris Plan?

The Court: Now then, you have made an objection as to any oral assignment. I will overrule the objection at this [30] time without prejudice to your right to move to strike in the event that you have any further legal objections to make. I want to hear the transaction. Will you proceed?

The Witness: What was the question?

Mr. Sharff: Will you repeat the question, Miss Reporter?

(Record read.)

The Witness: Yes, that is correct. We received —our bank received the original mortgage from the Morris Plan and handed it to us.

Q. (By Mr. Sharff): In preparation for this trial, Mr. Halton, did you, and did you have a search made for that original mortgage?

A. Yes. We have searched diligently through our records. But somewhere or another we have mislaid the mortgage and could not produce it for this trial.

Mr. Blackstone: That is certified by the County Recorder?

Mr. Sharff: By the County Recorder, yes.

May I erase some notes I made here in pencil (showing document to Mr. Blackstone) prior to the time I put them in evidence?

(Testimony of Edward H. Halton.)

The Court: Either that, or we will ignore them.

Mr. Sharff: I might not be able to read them, you Honor, I might say facetiously.

The Court: All right. Plaintiff's Exhibit [31-32] 2, a certified copy of the mortgage.

Mr. Sharff: Yes. A certified copy of the Morris Plan mortgage dated the 24th of March, 1947, the mortgagor here being Lloyd Watson, the mortgage being with the Morris Plan Company of San Francisco. I ask that it be received as Plaintiff's next in order.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 2.

(Whereupon the chattel mortgage referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. (By Mr. Sharff): Mr. Halton, did you ever release that mortgage? A. No, sir.

Q. Did you ever deliver it to Mr. Lloyd Watson? A. No, sir.

Q. At the time you made this transaction, Mr. Halton, did you or anyone connected with the Halton Tractor Company know that Mr. Lloyd Watson owed any taxes to the United States Government? A. No, sir, I did not.

Q. Now some time in December, 1947, did Mr. Lloyd Watson come to see you?

A. Yes. In the first week of December of 1947 Mr. Watson came again to Merced. And in my office where he and I only—— [33]

(Testimony of Edward H. Halton.)

Q. Pardon me, just a moment now. Fixing that date in December, Mr. Halton, up to this time had Mr. Francis J. Reilly called upon you in regard to any taxes owing by Mr. Watson?

A. No, sir; no, sir.

Q. How do you fix the time of the year, Mr. Halton, other than just by your recollection?

A. Well, it was winter and it had been raining a good deal; and that is one of the reasons which entered into our conversation with Watson, that I know it was about that time.

Q. Was it getting close to the end of the year?

A. Right.

Q. And what was the condition of the payments under the conditional sales agreement in the chattel mortgage, had they been kept up to date?

A. No. Mr. Watson was behind with us in his payments on this equipment.

Q. In other words, this was a meeting to determine what Mr. Watson was going to do about these indebtednesses, is that correct? A. Right.

Q. All right. I presume that only you and Mr. Watson were present? A. Correct.

Q. Will you tell us what the conversation was between you [34] and Mr. Watson was at that time and place?

A. Yes. Mr. Watson told me that he was very discouraged for the reason that he was unable to make any money with this type of rubber-tired tractors and scrapers, and that he felt that he couldn't make a go of his payments to us, and that he

(Testimony of Edward H. Halton.)

wouldn't be able to come out with this equipment, and that the fact that it was rather old and needed lots of repairs. He asked me what he should do. We listed up his equipment that he had, all of it. We came to the conclusion that we could sell his equipment after repairing it and putting it up in shape for sale, that we could repair it and sell it and he would have an equity in the equipment.

And I agreed to do this for him, of course, deducting our costs of doing it. But I agreed to do it. And with the equity left over I agreed to give him a credit on our books for the purchase of either new or good, excellent equipment for the reason that he had been a successful contractor when he operated one tractor and scraper when he did a lot of the work himself, actually, and had been very successful, had made a lot of money at it.

And then when he tried to get big in this business, he lost his shirt and was losing money fast at that time. So we agreed to do these things for him. He agreed in turn to bring all of his equipment and place it on our lot at Los Banos, which was the nearest to his job. [35]

Q. Well now, Mr. Halton, allow me to interrupt you there, please. At the time that you and Mr. Watson had this conversation, did Mr. Watson say anything to you about owing the United States Government taxes? A. No, he did not.

Q. Did you know anything about it?

A. No, sir.

Q. Now let us go back over this again. Now tell

(Testimony of Edward H. Halton.)

us just what or how, rather, the money was to be applied after—withdraw that.

First of all, I understood you were to repair the equipment after it was brought in?

A. Right.

Q. All right. Now in what manner was it to be sold, at an auction or—

A. No. It was our intention to bring the money in, as I agreed with Watson.

Q. You mean equipment, not money?

A. Bring equipment in. I am sorry.

The Court: Bring the equipment in and repair it?

A. Paint it, put new seat covers on it, straighten up the tin work, and otherwise put it in good running order so that we could list it with our regular list of used equipment and that we could sell it in an orderly manner to obtain a good price for [36] Watson.

Q. (By Mr. Sharff): All right. Now will you tell us what your conversation was with Mr. Watson as to how the proceeds were to be applied resulting from the sale of this equipment in the usual course of your business?

A. Yes. I told him that we would put the equipment through our shop, *but* in the repairs and labor, new parts where necessary, and put the equipment in good condition for sale. Then we would list the equipment with our regular used tractor list, and that our salesmen then would sell them, and from the proceeds of the sale—we would deduct first, of

(Testimony of Edward H. Halton.)

course, the money he owed to us plus the cost of repair, labor, and parts, and the cost of selling as we pay our salesmen on a commission basis and we have other costs of selling, advertising, and so on—and from that we would give him a credit on our books.

Q. Now did Mr. Watson bring in the equipment, just yes or no? A. Yes.

Q. And to what place of business of yours did he bring it? A. To our store at Los Banos.

Q. Can you tell us over what period of time he brought it in, sir?

A. Well, it was over an extended period of time for the reason that he had not quite completed—he had two or three more days' work to do on the job that he was on. And either [37] because of rain or something, anyway, all of the equipment did not get there until January. In fact, we had to go into Northern California to get one of the pieces of equipment which would not operate. The motor was broken; it was dead. We had to put that on our truck and haul it into Los Banos. So all of the equipment did not get into Los Banos until some time in the middle of January.

Q. Now by this same date, the middle of January, Mr. Halton, was any equipment of Mr. Watson's not covered by your conditional sales agreement and not covered by your mortgage also put on your lot by Mr. Watson?

A. Yes. Mr. Watson put four D-W Caterpillar, D-W 10's, and scrapers belonging to Mr. Wes Dur-

(Testimony of Edward H. Halton.)

ston on our lot along with the equipment that we had covered.

Q. Now tell me this, also, besides the property covered by your chattel mortgage and conditional sales contract, did Mr. Watson also bring in other equipment he owned which was not Mr. Durston's also?

A. Yes. He brought in a touring car and a pickup and brought those in with the pink slips of the cars and brought them in to us also.

Q. I presume there will be no objection to any leading questions on that.

Did he also bring in a Southwest Rooter?

A. Yes, he brought in a Southwest Rooter. [38]

Q. And four diesel fuel tanks?

A. Yes, on wheels. A little wagon brought them in, too.

Q. All right. Now can you tell us approximately when Mr. Francis J. Reilly came to see you the first time?

A. Mr. Reilly came to see me in the latter part of January of 1948.

Q. And where did you see him?

A. He came in to my office at Merced.

Q. Now when he came in to see you, what did he say to you?

A. Mr. Reilly told me that he had been over to Los Banos and had been to see Mr. Watson and had seen our equipment, Mr. Watson's equipment being brought into our store, into the lot there at Los Banos.

(Testimony of Edward H. Halton.)

Q. All right. Now tell me, did you know Mr. Reilly?

A. Yes, we knew Mr. Reilly very well. He lived in Merced and we have done and still do a considerable amount of business with Mrs. Kirby, who is Mr. Reilly's sister, I believe.

Q. Now did Mr. Reilly say something to you on the subject of taxes being owed by Mr. Lloyd Watson?

A. Yes. He pointed out to me that Mr. Watson had not paid social security taxes, I believe they were, and that the Government had filed a lien, or at least had filed something in the County Recording Office against Watson for the recovery of the taxes. I was very surprised at this. [39]

Q. That was the first time you had heard about any taxes owing by Mr. Watson, is that correct?

A. Yes, sir; yes, sir.

Q. What did you say about that?

A. Well, I was anxious to find out about the taxes and I made inquiries into the court house to actually—

Q. Please let's not go to that yet, Mr. Halton. What did you say to Mr. Reilly, if anything, when he told you that Lloyd Watson owed taxes and that it had a lien?

A. Oh, I objected to paying somebody else's taxes. I told Mr. Reilly that this—that I didn't want to pay taxes for somebody else and that we had a conditional sales contract and a mortgage on this equipment and we thought we were protected

(Testimony of Edward H. Halton.)

that way. But Mr. Reilly told me that they were not because he said the government lien was prior to those things, that the indebtedness for these taxes, the social security taxes, had been incurred on this equipment of Watson's and that the Government had a right to seize this equipment belonging to Watson.

Q. Did Mr. Reilly make any statement of what the United States Government would do in regard to this equipment if you did not pay the taxes, Mr. Halton?

A. Yes. He told me that he had the right to seize it and sell it at a forced sale. And I pointed out to Mr. [40] Reilly that if they sold that equipment in the condition that it was then in, that in a forced sale that he wouldn't recover possibly more than a quarter of the value of the equipment.

Q. All right. At that date and at that time did Mr. Reilly tell you how much was owing in the amount of taxes?

A. I asked him that question and he did not know the amount of money owing on the taxes except that he told me he thought it was between \$7,500 and \$8,000, but that he didn't have all the figures together.

Q. All right. You have given us now the substance of your conversation, the first visit from Mr. Reilly, I believe, haven't you?

A. Right.

Mr. Sharff: I don't know your Honor's rule about recesses.

(Testimony of Edward H. Halton.)

The Court: Well, I am about ready to take one if you have come to a convenient place.

Mr. Sharff: I have come to a convenient place, your Honor, yes.

The Court: All right, just as soon as I can make these notes we will take the recess. All right, we will be at recess.

(Recess.) [41]

Afternoon Session—March 9, 1955, 2 P.M.

Q. (By Mr. Sharff): After Mr. Reilly left, Mr. Halton, did you make any investigation to see if the United States Government had filed a lien?

A. Yes, I did. I went up to the court house—to the Recorder's Office at the court house, and saw that they had filed this document against Mr. Lloyd Watson.

Q. Now tell me this, you told us that Mr. Reilly did not know the amount of the taxes when he saw you on the first occasion. Did you make any effort to ascertain the amount of taxes that he did owe?

A. Yes. Several days later I went into their office, the Internal Revenue office in Merced, and Mr.—

Q. Whom did you see there?

A. Mr. Reilly was not in and I talked with Mr. Crisa.

Q. Who is Mr. Crisa?

A. Mr. Crisa was in charge of that office at that time.

(Testimony of Edward H. Halton.)

Q. Was he known to you?

A. Yes. Mr. Crisa and I had served on a vestry in our church together. I had known him for a number of years. And so we discussed this situation. I asked Mr. Crisa if he had the amount of money yet that was due to the Government by Watson. And Mr. Crisa said he didn't know anything about the amount of money, that Mr. Reilly was handling the matter [42] completely and that—and I asked him if in his opinion I had to pay for it, pay this lien for Watson. And he told—he substantiated what Mr. Reilly had previously said, that I did have to pay it.

Q. Did you mention the matter of your chattel mortgage and conditional sale to Mr. Crisa?

A. I do not recall that I spoke of that chattel mortgage at the time, no.

The Court: How is Crisa spelled?

A. C-r-i-s-a. Connie, as far as I am concerned.

Q. (By Mr. Sharff): Now there was another time when you saw Mr. Reilly when the two of you went to Los Banos, wasn't there? A. Yes.

Q. Now was that the next time Mr. Reilly saw you or was that the third time?

A. That was the next time that he saw me.

Q. All right.

A. And we talked on the telephone and made an appointment for the following day. Mr. Reilly came to our store on 16th Street in Merced and I took him in my automobile over to Los Banos, at which time he affixed a piece of paper which began,

(Testimony of Edward H. Halton.)

"The property of the United States Government." I don't know what you would call it. But he placed these things onto the D-W 10's and scrapers, which were at that time on [43] our lot.

Q. All right. Now let's stop right there. You say D-W 10's and scrapers? A. Yes.

Q. How many were covered by the Morris Plan mortgage and by the conditional sales agreement as of that date, sir?

A. There were two D-W 10's covered by the conditional sales agreement and there were four D-W 10s covered by the mortgage.

Q. And to whom did the other two D-W 10's belong?

A. They belonged to Mr. Wes Durston. However, he put the papers on all of them.

Q. You have mentioned previously a touring car, I believe, and a pickup truck. A. Right.

Q. That Mr. Watson brought to your place at Los Banos. A. Right.

Q. Was that on the lot at Los Banos?

A. No, sir.

Q. It was not?

A. No, sir. They were—we had taken those two vehicles and delivered them to the McAuley Motor Company, the company from whom we buy principally our own cars and equipment and—

Q. Now when you were at Los Banos there, did you have some conversation with Mr. Reilly about the two cars or [44] automobiles?

A. Yes. I explained to Mr. Reilly where these

(Testimony of Edward H. Halton.)

cars were and that we had made an arrangement for Mr. McAuley to sell these automobiles.

Q. What did he say then?

A. And he told me that they were covered—that they would be attached just the same as the tractors and scrapers were attached, that they were under the same seizure arrangement and that—and I pointed out to him that in all probability that sale of these machines would probably be consummated or at least would be consummated very shortly, and that I was sure that with our connections that we could get as much money out of them as possible for anyone to get. And I told Mr. Reilly that we would just take the McAuley check that we got from the sale of these cars and deliver it to him. And he told me, well, that being the case, then the Government wouldn't seize them and that they would go ahead and let McAuley sell them; and that if I would agree to hand the proceeds over to the Government when it was paid to us, which I agreed to do and which we did, it was \$2200.

Q. How much?

A. \$2200 that we received for the machines. And we paid that. We gave that check to Mr. Reilly.

Q. I show you your check No. 4718 of the Halton Tractor Company in the amount of \$2200 drawn on the Bank of America [45] at Merced payable to the Collector of Internal Revenue, and ask you if that is the check you just referred to?

A. Yes, \$2200.

Mr. Sharff: I ask that that be received as Plain-

(Testimony of Edward H. Halton.)

tiff's next in order. The date, your Honor, is February 5th, 1948.

The Court: All right. It will be admitted into evidence as Plaintiff's Exhibit 3.

(Whereupon check for \$2200 referred to above was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Sharff): After this conversation at Los Banos did you and Mr. Reilly then return to Merced? A. Yes.

Q. In your car?

A. I took him back to Merced.

Q. On that trip did you have any further discussion about the situation with Mr. Reilly?

A. Yes, I did.

Q. Will you tell us what you said and what Mr. Reilly said?

A. I said to Mr. Reilly, I said that here we were paying taxes for somebody else and we weren't even getting a hearing or a trial of any kind. And he told me that we—our procedure would be to pay the taxes and then we could get—we could protest the payment and get a hearing before the Internal Revenue Department to recover the taxes—to recover [46] this money that we were paying for Watson. And I told him that was a fine high-handed way to do. It was practically a Gestapo method. And Mr. Reilly said no, that we could get—we would have a hearing if we protested it.

Q. Mr. Halton, what papers if any were ever

(Testimony of Edward H. Halton.)
served upon you or delivered to you by Mr. Reilly?

A. Well, it was not until after we had given Mr. Reilly the \$2200 check that Mr. Reilly ever presented us with the exact amount of money that was owing to the Government. And he brought a yellow sheet of paper into our office and handed it—I was out at the time—he handed it to our bookkeeper.

Q. I show you a document, a yellow paper here. I ask you if this is the document that was left at your office by Mr. Reilly?

A. Yes, sir, that is the one.

Q. Did you ever receive—I am sorry. Just one moment.

Mr. Sharff: I will offer that in evidence at this time.

The Court: Plaintiff's Exhibit 4.

Mr. Sharff: Would your Honor wish to inspect it?

The Court: It's the same as the exhibit that is attached, is it?

Mr. Sharff: It's the same as the one attached to the complaint, your Honor, yes.

The Court: All right. I don't care to look at it now. [47]

(Whereupon document entitled "Lloyd Watson Analysis of Taxes," referred to above, was received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Edward H. Halton.)

Q. (By Mr. Sharff): Other than the document just received in evidence—

The Court: When was this turned over?

Q. (By Mr. Sharff): About when did you receive this, Mr.—

A. During the first part of February.

Q. Yes?

A. Probably it was some time after we had handed—it was a few days after we had handed Mr. Reilly the check dated February 5th.

Mr. Sharff: In fact, your Honor, it shows the rest of the \$2200 here right on it.

The Witness: It is not dated.

Q. (By Mr. Sharff): But I said, Mr. Halton, that the payment for \$2200 is shown on this.

A. Right. But we received that after that and it is not dated.

Q. Mr. Halton, other than the document just received in evidence as Plaintiff's Exhibit 4, were any other papers ever served upon you or the Halton Tractor Company? A. No, sir.

Q. Now did you on or about during the period we have just [48] been discussing communicate with Wes Durston? A. Yes. I called—

Q. And you called him on the phone, did you?

A. I called him on the telephone.

Q. Where did you reach him, sir?

A. I got him at his place of business in Los Angeles.

Mr. Blackstone: May I interrupt? I didn't get the date of that.

(Testimony of Edward H. Halton.)

Mr. Sharff: I said during this same period.

Mr. Blackstone: Can that be fixed?

Q. (By Mr. Sharff): Can you fix the date any more exactly, Mr. Halton?

A. Yes. It was the day after I had been to Los Banos with Mr. Reilly.

Q. And what is your recollection as to when you were with Mr. Reilly—may I withdraw that?

A. That I talked this matter over with Mr. Durston prior to the actual placing of the stickers. I advised him of Mr. Reilly's conversations with me. But then I called him and after February—after the last day of January, or the latter one or two days after January when the stickers were placed on the tractor—

Q. You mean in February they were—

A. In February.

Q. Yes? [49]

A. And I called him on the telephone the following day after I had gotten back with Mr. Reilly. I told him that the stickers were on his machines, as well as ours, and that the total amount of money we thought was going to be around \$8,000. We still at that time did not know what the amount of money was.

Mr. Sharff: Your Honor, I am offering this as verbal acts which I think are admissible in this situation.

The Court: Well, there has been no objection, so proceed.

Mr. Scharff: Very well.

(Testimony of Edward H. Halton.)

Q. Continue with your conversation with Mr. Durston.

A. And after we were served this yellow foolscap paper to give us the exact amount of money that was involved then I called Mr. Durston again and told him, that I discussed with him the total amount of equipment that he had and what I thought should be his fair share of the bill involved.

Q. You have just referred, I believe, when you said a yellow foolscap, to Plaintiff's Exhibit No. 4, is that correct?

A. Yes, sir, that is what I mean.

Q. Well, in your conversation with Mr. Durston, did you say anything about or anything on the subject of his conditional sales contract, or did he say anything about it?

A. He told me that the Government couldn't do that, that it [50] was on a conditional sales contract. And I told him of our conversations that I had had with Mr. Reilly, and that the Government had put these papers on the machines; and that if we didn't pay the Government off, that the Government was going to have a forced sale and sell them and we would be left out in the cold.

So Mr. Durston agreed and I agreed on the amount of money which would be his fair share of the total. And he agreed to send me a check at a later date. He said he couldn't send it right then, but at a later date for \$3900, which he did. He sent me a check.

Q. I show you a check of Wes Durston, Inc.,

(Testimony of Edward H. Halton.)

dated June 30th, 1948, payable to the Halton Tractor Company, for the amount of \$3900. I ask you if that is the check which you received, the \$3900 you have just mentioned, Mr. Halton?

A. Yes, sir, that is the check.

Mr. Sharff: I ask that this be received in evidence as Plaintiff's next in order.

The Court: It will be received in evidence as Plaintiff's Exhibit 5.

(Whereupon check of \$3900, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Sharff): After that, did you pay a further amount to the United States [51] Government?

A. Yes, sir. Then I paid the difference, the balance which is due on the bill the Government had given me, which we call No. 4.

Q. I show you a check of the Halton Tractor Company dated February 16th, 1948, bearing No. 5022, payable to the Collector of Internal Revenue, for the amount of \$7,777.97. I ask you if this is the check by which you paid the balance of taxes to the United States Government?

A. Yes, sir, that is the balance.

Mr. Sharff: I ask that this be received in evidence as Plaintiff's next in order.

The Court: It will be Plaintiff's 6.

(Whereupon check of \$7,777.97, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 6.)

(Testimony of Edward H. Halton.)

Q. (By Mr. Sharff): Mr. Halton, when you paid this money by these two checks to the United States Government, did you expect the Government to keep the money finally?

Mr. Blackstone: I object to that question, your Honor. I think it's completely irrelevant, asking for the opinion and conclusion of the witness.

The Court: Yes, I think I have to sustain that.

Mr. Sharff: Very well, your Honor.

Q. What was your state of mind, Mr. Halton, when you paid these checks? [52]

Mr. Blackstone: I object to that, your Honor. That is completely irrelevant and hasn't anything to do with the issues in this case.

Q. (By Mr. Sharff): Why did you pay this money, then, to the United States Government, Mr. Halton?

A. Because I was told that is the way I had to do.

Q. And what were you told the alternative was if you didn't pay it?

A. I was told that the goods would be seized and sold at a forced sale. And I knew this equipment wouldn't bring hardly anything on a forced sale because some of the equipment wouldn't even run.

Q. Well, now, this equipment was on your property there at Los Banos. Did your company do anything in regard to it, repairing it and such?

A. Yes. After we had—we didn't touch it until we had paid that last check. And then when we had paid the last check we went ahead and we repaired,

(Testimony of Edward H. Halton.)

as I agreed with Watson, we went ahead and repaired the equipment, put it up in good running condition. And then when we sold it, over quite a long period of time—the last pieces were—the last of the pieces were sold, my recollection, a year later. But we recovered our money out of it.

Q. Assuming, Mr. Halton, that this equipment after being repaired and being exposed on the market for approximately a [53] year, was sold for the sum of \$57,000, are you able to tell us approximately what amount that equipment would have brought if it had been sold in the condition it was in when brought to you by Mr. Watson?

Mr. Blackstone: I object to that as asking for the purely speculative opinion, your Honor. I don't see that it has any bearing on this case.

The Court: What you are really asking him is what it would have brought it in the condition that it was when the Government put its notices on there?

Mr. Sharff: That's right, sir.

The Court: Well, he is a qualified man on values on this kind of equipment. I will overrule the objection. What would it have brought at that time?

The Witness: I doubt very much, your Honor, if it would have brought the amount of money we paid to the Government, the ninety-eight hundred or ninety-nine hundred dollars.

The Court: That is all of the equipment, including Durston's?

A. No, sir, not including Durston's. I am talk-

(Testimony of Edward H. Halton.)

ing about—well, even including Durston's, some of it wouldn't run, either.

Q. Well, from what your knowledge of the equipment—I suppose you had better segregate it first as to the equipment you claimed an interest in. How much would it have brought [54] on the market without being repaired or reconditioned?

A. If we had had a forced sale, an auction sale there on the property, I do not believe our equipment—that the equipment there would have averaged more than fifteen hundred—eighteen hundred dollars per unit.

The Court: How many units were there?

A. Ten in total; six belonged to me and four belonged to—

Q. Well then, that would be, you say, \$1800 a unit?

A. Yes, sir. I can further say that a year or two later, not right at that time, but a year or two later I bought the same piece of equipment for one unit from M. J. Rudy in Modesto for \$1500.

Q. (By Mr. Sharff): Were the market conditions in 1948 similar to those a year later?

A. Yes, sir, approximately.

Q. All right. In your opinion, Mr. Halton, was this equipment sold at the highest and best price obtainable on the market at that time?

A. Yes. I thought we were very fortunate in our sales.

Q. Now, you don't know of your own knowledge the balance that was due from Mr. Watson to Hal-

(Testimony of Edward H. Halton.)

ton Tractor Company on the mortgage and the conditional sales contract as of January 31st, 1948, do you? A. No, I couldn't say that here.

Q. That would be better for your bookkeeper to testify to? [55] A. Yes.

Q. And who is your bookkeeper, sir?

A. Mr. Frank Bostick.

Q. He is in the courtroom here?

A. Yes; that is Mr. Bostick there (indicating).

Cross-Examination

By Mr. Blackstone:

Q. Mr. Halton, you have testified that you purchased a Morris Plan chattel mortgage, which is Plaintiff's Exhibit 2, and that you have failed to locate the original copy of that mortgage.

A. That is right.

Q. I would like to have you examine this certified copy of a mortgage of chattels—which before looking at I would like to have it marked Defendant's Exhibit A for identification.

The Court: For identification it will be marked Defendant's Exhibit A.

(Whereupon photostatic copy of chattel mortgage was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Blackstone): Would you look at that, Mr. Halton, and tell us if you recall the execution of that chattel mortgage by Lloyd [56] Watson?

(Testimony of Edward H. Halton.)

Q. Would you look at that, Mr. Halton, and tell us if you recall the execution of that chattel mortgage by Lloyd Watson? A. Yes.

Q. Did you accept that chattel mortgage from Lloyd Watson? A. Yes.

Q. It bears the date October 2nd, 1947. Is that the date on which the mortgage was executed and delivered to you? A. Yes.

Mr. Sharff: Your Honor, I would like the record to note my objection at this time.

The Court: Well, make it.

Mr. Sharff: That it is incompetent, irrelevant and immaterial. The second mortgage under the decision of the United States courts that even if a third party discharges—pays off the mortgage of the taxpayer, nevertheless there is equitable subrogation even though they release it. Therefore it is incompetent, irrelevant and immaterial, and I submit authorities on that point, your Honor. Even though the man paying off the mortgage advances further monies and takes a new mortgage discharging the first one, he is still protected to the amount paid by the first mortgage. If your Honor desires authorities on it, I can do it, I can make any objections for the record if your Honor wishes to hear the evidence nevertheless. [57]

The Court: I will reserve ruling on that objection. I do want your authorities because I presume you take the position that this is some sort of either a merger or an innovation or a new—

(Testimony of Edward H. Halton.)

Mr. Blackstone: Yes, your Honor; at least that is what I am trying to find out.

The Court: I will permit the testimony to go in subject to the objection, and reserve ruling on it.

Q. (By Mr. Blackstone): Can you state, Mr. Halton, what this mortgage was intended to secure, what indebtedness from Watson was this chattel mortgage—I have shown you Defendant's Exhibit A for identification—what debt was that intended to secure? A. You say, "Will I state"?

Q. Can you state. A. Surely.

Q. Well, can you tell us what it is?

A. Yes. That mortgage was to outline the method of payment and to cover certain items which were not under the Morris Plan mortgage.

Q. May I have Plaintiff's Exhibit 2? I hand you Plaintiff's Exhibit 2 and Defendant's Exhibit A for identification and I would ask you to state which items of equipment covered by Plaintiff's Exhibit 2 are included in Defendant's Exhibit A for identification? [58]

Q. (By Mr. Sharff): Mr. Halton, would you rather work from the original? It would be easier for you to read, I think. You may keep that one, Mr. Blackstone.

The Witness: Now, what would you like me to do?

Q. (By Mr. Blackstone): I would like to have you state which items of equipment covered by the Morris Plan chattel mortgage are also covered by the mortgage marked Defendant's Exhibit A for

(Testimony of Edward H. Halton.)

identification. A. On one we have—

The Court: Which one? That would be the second one.

A. Yes, sir.

Q. That is the one between Halton and Watson?

Mr. Sharff: Yes, your Honor.

The Witness: Yes, sir. I am kind of confused here. I don't know what you want me to do.

The Court: He wants to know which equipment is covered in the second chattel mortgage which was not included in the Morris Plan chattel mortgage; is that correct?

Mr. Blackstone: First of all, your Honor, I would like to know and have a matter of record which items of equipment covered by the Morris Plan mortgage are likewise set forth and covered by the second mortgage which is marked for identification Defendant's Exhibit A.

The Witness: Yes. The first difference is that—

The Court: He said he first wants the similarity; he [59] wants the similar ones first.

The Witness: Beginning here?

Q. (By Mr. Blackstone): Yes, please do. Just read them out even though it will take a little time.

Mr. Sharff: No objection to me watching there?

The Court: No.

The Witness: The Morris Plan mortgage listed two D-8 tractors, which are at the top of their equipment. That does not appear on the one that we recorded. The second item of four DW10

(Testimony of Edward H. Halton.)

scrapers are identical in both. The next item is LeTourneau carryall, which is the same in both; a Model SP carryall, which is the same in both; a Woolridge carryall, which is again identical. Then in the Morris Plan mortgage there are two double-drum LeTourneau power control units. They are the things that go on the back of the tractor to operate the carryall and we have one on this second mortgage. The Southwest rooter is identical in both. The automobile—wait a minute; I am getting back to this one here. This dozer is not listed in our mortgage and it was listed in the Morris Plan mortgage. Then that concludes the list of the chattels under the Morris Plan.

Then in addition we show four diesel fuel tanks with wagons. Those were four rubber-tired—four tires and rubber-tired wagons with a large fuel tank, on the back of it there was a rack to put grease cans and pressure guns and odds and [60] ends for greasing tractors.

Q. (By Mr. Blackstone): In other words, and if I may interrupt there, that equipment was not covered by the Morris Plan mortgage?

A. Right. And the two automobiles, the pickup and the touring car were on this October 2nd one.

Q. Now, do I understand correctly, Mr. Halton, that you paid \$25,930, which was stipulated, was paid to the Morris Plan to take over their mortgage? Is that the testimony? A. Yes.

Q. This mortgage, which is Defendant's Exhibit

(Testimony of Edward H. Halton.)

A for identification, you have the original there in front of you? A. Yes.

Q. Was to secure the sum of \$56,000. Can you explain why the sum set forth in this second mortgage is greater than the amount you have stated has been paid to Morris Plan in taking over their mortgage? A. Yes.

Mr. Sharff: I beg your pardon, Mr. Blackstone. It does not cover the amount of \$56,000; it covers the amount of \$28,000.

Mr. Blackstone: I beg your pardon.

Mr. Sharff: The fifty-six merely refers to the total amount of future advances.

Mr. Blackstone: Thank you. I stand [61] corrected.

Mr. Sharff: I didn't mean to be so short on it. You caught me by surprise, \$56,000.

Q. (By Mr. Blackstone): I read from the wrong line. This mortgage, then, that is marked Defendant's Exhibit A for identification was to secure the sum of \$28,000. Is that correct?

A. Yes, sir.

Q. Does that represent, then, the amount that you paid to the Morris Plan?

A. No, sir. The amount that we paid to the Morris Plan is by that check.

The Court: Well, he wants to know, though, if that included the amount that was paid to the Morris Plan?

The Witness: Oh, yes, sir.

Q. (By Mr. Blackstone): Do I understand cor-

(Testimony of Edward H. Halton.)

rectly, then, that from the date that you paid Morris Plan \$25,930 to the date when this second mortgage was executed, additional indebtedness had been incurred by Lloyd Watson to Halton Tractor?

A. Oh, I presume it had.

Q. Have you checked the records of the County Recorder of Merced County in regard to the Morris Plan chattel mortgage? A. Yes, sir.

Q. You have done that yourself?

A. Yes, sir. [62]

Q. Have you found of record any release of that chattel mortgage?

A. Well, the Morris Plan mortgage—

Q. Yes? A. No, we never released it.

Q. I didn't ask you if you released it.

A. It was never released.

Q. I am asking you if you yourself checked the record of the County Recorder to see.

A. Oh, yes, a long time ago, too.

Q. Well, when was the time that you checked the records in that regard?

A. I couldn't state, but it's been five or six years ago.

Q. Yes, I would presume we are talking in terms of 1947 and 1948.

A. But to ask me when I went up and looked at it, I can't tell you.

Q. Let me put it this way: I believe our stipulation was in terms of September 29th, 1947, that you paid this money to the Morris Plan.

A. Right.

(Testimony of Edward H. Halton.)

Mr. Sharff: Yes, your Honor—yes, Mr. Blackstone, that is correct.

Q. (By Mr. Blackstone): Did he check the records of the County Recorder's office on that [63] date? A. No.

Q. Before that day? A. No.

Q. Well, then, after that day?

A. Yes. I checked the records when we started talking with Mr. Jonas about recovering this money, which was only five or six years ago. It was after this whole transaction had transpired under—

Mr. Blackstone: I see. At this time, your Honor—

The Witness: At that time we had the original copy of the Morris Plan.

Mr. Blackstone: At this time, your Honor, I would like to offer in evidence Defendants' Exhibit A heretofore marked for identification.

The Court: Well, subject to your objection, the order which I have already made—

Mr. Sharff: Yes.

The Court: I will admit it into evidence. And, of course, if I rule on the objection, why, then, of course, you can make a motion to strike. In other words, I will deem a motion to strike for the reasons given for the objection as having been made and reserving ruling on the motion to strike. But I will overrule the objection so the matter will go into evidence.

Mr. Sharff: Thank you, your Honor. [64]

(Testimony of Edward H. Halton.)

The Court: And it will be subject to the motion to strike.

(Whereupon Defendant's Exhibit A, heretofore marked for identification, was received in evidence.)

Q. (By Mr. Blackstone): This conversation that you had with Watson when he came and said that he was discouraged about being able to work out his financial problems, can you fix an approximate time of that conversation?

A. Yes, about the first week in December.

Q. And you have stated what that conversation consisted of in which you agreed to repair the equipment and sell it and any excess would be paid to Mr. Watson; is that correct?

A. No, sir. I—I testified that the excess would be given to him as a credit on our books.

Q. For future advances that you would make or—

A. For future purchases that he might make.

Q. For future purchases? A. Yes.

Q. Well, it is true, then, isn't it, that at that time you recognized that given a chance to sell the equipment there would be some equity in the property that would belong to Mr. Watson?

A. Right.

Mr. Sharff: I don't think that is a fair question, your Honor. I object to it as calling for an opinion and [65] conclusion and it is incompetent, irrelevant and immaterial.

(Testimony of Edward H. Halton.)

The Court: Overruled.

Mr. Sharff: Very well.

Mr. Blackstone: I believe that he answered it, "Right."

The Court: He answered it, "Right."

Q. (By Mr. Blackstone): Now, between that first conversation with Mr. Watson and your first conversation with Mr. Reilly, did you have any further conversations with Watson?

A. No. I might have seen him, but nothing relative to his account.

Q. Now, you have stated that your first conversation with Mr. Reilly in regard to the taxes owing from Watson occurred in the latter part of January? A. Yes, sir, 1948.

Q. And they came to your office in Merced?

A. Yes.

The Court: Mr. Blackstone, now, are you going to all of these conversations with Reilly? I presume that that is going to be an important phase of cross-examination, isn't it?

Mr. Blackstone: Yes.

The Court: Well, we have come to the noon recess, then, because that is going to be one of your basic subjects of discussion. I don't want to break it up because from what I have heard before, I deem it to be an important phase of [66] the case.

We will be at recess until 2:00 o'clock.

(Whereupon an adjournment was taken to 2:00 o'clock p.m.) [66-A]

Afternoon Session—2:00 P.M.

The Court: All right, Mr. Blackstone. Would you proceed with your cross-examination?

EDWARD H. HALTON

resumed the stand.

By Mr. Blackstone:

Q. I think we left off, Mr. Halton, at the time when Mr. Reilly came to your office and you had your first interview with him about the tax liability of Lloyd Watson. As I recall, you fixed that conversation as taking place some time in January, 1948; is that correct? A. Yes.

Q. Now, when Reilly came into your office he told you, did he not, that the Government had filed a tax lien against Lloyd Watson? A. Right.

Q. In the County Recorder's office in Merced County? A. Yes.

Q. He also told you, didn't he, that the date that that tax lien had been filed was September 16th, 1947?

A. Well, he may have. I don't remember whether he did that or not.

Q. Well, you may not have recalled the specific date, but didn't he give you the information as to the date of the tax lien?

A. He told me that the Government had filed a lien. [67]

Q. And didn't he also say that that lien was filed ahead of your chattel mortgage?

A. He probably did. I don't remember.

(Testimony of Edward H. Halton.)

Q. And didn't he tell you, Mr. Halton, that the Government tax lien then had priority over your chattel mortgage lien; don't you remember that?

A. Yes, that's right. And he went on to tell me, too, that since the social security taxes had been incurred upon these machines, those were the ones that the Government was going to exercise on.

Q. Do you mean to say, Mr. Halton, that the machines themselves somehow had incurred a tax liability? A. Right.

Q. Is that your understanding of what he said to you? Wasn't it rather that he told you that Lloyd Watson in his operations had incurred tax liability and that the tax then became a lien on his equipment?

A. No, because I pointed out to him that part of our machines were on conditional sales contract and he told me it didn't make any difference.

Q. You mentioned that you had a conditional sales contract to him? A. Yes.

Q. Did you exhibit a copy of the contract to him? A. No. [68]

Q. Did you tell him what date it had been entered into? A. No.

Q. Well, Mr. Reilly told you, did he not, that the Government intended to take hold of the equipment and sell whatever interests— A. Yes.

Q. —that Mr. Watson had in the property, is that correct?

A. He told me they were going to sell it for this tax lien.

(Testimony of Edward H. Halton.)

Q. And he had told you that in his opinion the tax lien had priority over your chattel mortgage lien, is that correct? A. Yes.

Q. Now did Mr. Reilly tell you that the Government tax lien had priority over your interests in the property under the conditional sales contract?

A. Yes, over everything. I was stuck for the whole works.

Q. In other words, you are saying then that Mr. Reilly told you that the Government would come along and sell out your interest in the property; is that what you said?

A. That's right, that's exactly right.

Q. And after you had been very careful to point out to him the conditional sales agreement?

A. (Witness nods head in the affirmative.)

The Court: The witness nodded his head in the affirmative. I don't know if the reporter got that or not.

Q. (By Mr. Blackstone): Did you consult an attorney about [69] the right of the Government to sell your interest and property to pay somebody else's taxes? A. Yes.

Q. At that time? A. Yes.

Q. And what advice did you get?

A. He told me I had to pay the taxes.

Q. That the Government could sell out your interest under your conditional sales contract, is that what your attorney told you? A. Yes.

Q. Did you mention to Mr. Reilly that you were claiming under the Morris Plan chattel mortgage?

(Testimony of Edward H. Halton.)

A. I do not think so. I didn't have any claims under anything, according to Mr. Reilly.

Q. Isn't it true that in that first conversation you then asked Mr. Reilly how the tax lien could be released, what could be done to release the tax lien from that equipment?

A. Yes, probably I did.

Q. And didn't Mr. Reilly tell you that the way the tax lien could be released is if you would pay the taxes that were due?

A. Right. He told me I had to pay them.

Q. Did he say you individually were liable for the taxes of Mr. Watson? [70] A. Right.

Q. Did you consult a lawyer about that statement of Mr. Reilly's?

A. That is what he said.

Q. That you individually owed an obligation to the United States Government for the taxes of Lloyd Watson?

A. I explained to my lawyer verbatim what Mr. Reilly had told me, and the lawyer said he was correct.

The Court: Well, that wasn't, however, that you personally owed the taxes, was it?

A. No, because of the lien on the taxes—on the equipment that we had in our possession, right.

Q. (By Mr. Blackstone): All Mr. Reilly said to you, Mr. Halton, is that, is it not—I am asking you the question—that to release the tax lien the taxes would have to be paid?

(Testimony of Edward H. Halton.)

A. Well, that is not all he said to me, but he said that.

Q. Well, what else did he say in addition to that?

A. He told me our possession was inferior to the Government's and that we had to pay the taxes or the goods would be sold; the Government would sell them.

Q. And he also, you recall specifically that he told you your interest under the conditional sales contract was inferior to the tax lien?

A. Right.

Q. You do recall that specifically? [71]

A. Sure.

Q. Now you mentioned you asked Reilly how much the taxes were, and that he stated that they were somewhere between \$7500 and \$8000, is that correct? A. That is correct.

Q. Did he state to you—

A. He thought that they were—he told me that he did not have a total at that time and that he thought that that was what the total would run to.

Q. Did he say that that would include penalties and interest, or did he say that that was just the amount of tax?

A. No. He didn't elaborate on that at all.

Q. Now your next contact with any agent of the Government was your conversation with Mr. Crisa, I believe that is C-r-i-s-a?

A. Crisa, that is correct.

Q. Now your conversation with him as reported

(Testimony of Edward H. Halton.)

on your direct examination was that Crisa also told you that you had to personally pay the taxes; is that what he told you?

A. Mr. Crisa told me that what Mr. Reilly had told me was correct, that I had to pay the taxes.

Q. Isn't it true that what Mr. Crisa told you was that to release the Government tax lien, the taxes would have to be paid?

A. That is not so. [72]

Q. Did you tell Mr. Crisa about your conditional sales contract? A. No.

Q. Did you tell Mr. Crisa about the Morris Plan chattel mortgage? A. No.

Q. Did you tell Mr. Crisa what interest you were claiming in that property?

A. What do you mean?

Q. What interest you were claiming in that property at that time when you had your conversation with Mr. Crisa.

A. The thing that I spoke to Mr. Crisa about was—I had been to the County Recorder's office and I had seen there was a lien, and I came in to see Mr. Reilly to find out if he knew what that lien was and to try to work with him on the thing. And I asked Mr. Crisa, "Am I stuck for this lien?" And Connie said, "Yes," he thought I was. That is all I talked to him about. It was no more or no less.

Q. Mr. Crisa told you—

A. I felt very sad about paying \$10,000 or I thought at that time \$8,000.

Mr. Blackstone: I ask that that be stricken;

(Testimony of Edward H. Halton.)
his personal reactions I don't think are relevant.

The Court: All right, they will be stricken.

Mr. Sharff: It may go out, your Honor. [73]

The Court: He has already indicated as much anyway, however.

Q. (By Mr. Blackstone): After your conversation with Mr. Crisa you talked to Mr. Reilly on the telephone about going to Los Banos?

A. Right, right.

Q. And Reilly told you, did he not, that he was going down there to attach the property?

A. Right.

Q. For the taxes? A. Right.

Q. You then suggested you drive down together in your car? A. Right.

Q. When you got to Los Banos—at your shop, was it? A. Yes.

Q. Or plant? A. Uh-huh, store.

Q. Store, thank you. Mr. Reilly then put notices on various pieces of equipment, is that correct?

A. Yes.

Q. You said ten tractors and scrapers?

A. Yes, sir; yes, sir.

Q. Did you tell Reilly at that time that any of those tractors were sold to Watson under a conditional sales contract by Mr. Wes Durston? [74]

A. No. I just told him four belonged to Mr. Wes Durston.

Q. You remember telling him that?

A. Yes.

(Testimony of Edward H. Halton.)

Q. And when you say they belonged to Durston, on what are you basing that statement?

A. Mr. Durston was in some way releasing or selling to Watson. I don't know what the average amount was between Watson and Durston.

Q. So on direct examination when you said that Durston owned those tractors, that was just a colloquial way of speaking that you didn't really know exactly what his interest in the property was, is that correct?

A. That's correct. I knew it was pretty good because Watson was going to return them to Durston.

Q. Now you mentioned in your direct examination stating to Mr. Reilly the Government was using Gestapo tactics here. Was that statement made to Mr. Reilly in your drive to or from Los Banos?

A. Yes, right.

Q. Did you accuse Mr. Reilly himself of using Gestapo tactics?

A. No. I accused him as a government agent of using Gestapo tactics and I used that rather loosely, of course. But if I recall, in 1947 and '48 there was a good deal of talk about that sort of thing. [75]

Q. Did Mr. Reilly make any personal threats against you if these taxes were not paid by you?

A. No. He just told me to pay them and then I could protest them, get a trial.

Q. You definitely recall Mr. Reilly telling you that you could—

A. I not only definitely recall—

(Testimony of Edward H. Halton.)

Q. Will you let me finish the question. You definitely recall Mr. Reilly telling you about a refund procedure, is that correct? A. Yes, sir.

Q. Now on this Los Banos trip, was it then that you mentioned to Mr. Reilly about the two automobiles, the pickup truck, I think you said, and another automobile? A. Yes, sir.

Q. I think on direct examination you said that was other equipment that wasn't covered by any chattel mortgage of yours, is that correct?

A. Yes—

Mr. Sharff: I think you misunderstood his testimony. My question was whether that was included in either the conditional sales contract or the Morris Plan mortgage. That was my question, Mr. Blackstone, if you will pardon my interruption.

Q. (By Mr. Blackstone): Well, it is true that these two [76] automobiles are covered by the mortgage, which is Defendant's Exhibit A, isn't that correct, the mortgage of October 2nd, 1947?

A. Which is it?

Q. Here (indicating).

A. Oh. That one. That is the same as this one here (indicating).

Q. And the two automobiles that you talked to Mr. Reilly about are the automobiles covered by that chattel mortgage, Defendant's Exhibit A?

A. Right.

Q. And those two automobiles, I think your testimony was, were not covered by the Morris Plan chattel mortgage? A. Right.

(Testimony of Edward H. Halton.)

Q. Now on this trip where you mentioned that the automobiles were in the possession of the McAuley Motor Company, you stated, did you, that when the proceeds from the sale were received you would turn that over to the government, is that correct. A. Correct.

Q. Did Mr. Reilly agree to that procedure?

A. Yes.

Q. And as I understand, then, Mr. Reilly had not pasted any notices on those two automobiles that were there?

A. No, sir. They were not in Los Banos at the time we were [77] there.

Q. It was you who brought up the fact that the automobiles were at the McAuley Motor Company? A. Yes, sir.

Q. And it was you who suggested to Mr. Reilly that those would be sold and the proceeds would be paid to apply to Lloyd Watson's taxes, is that correct? A. Yes, sir.

Q. And Mr. Reilly agreed to that?

A. Yes, sir.

Q. And in fact that was carried out; they were sold for \$2200 and that check was paid to the Government, is that correct?

A. Yes, sir.

Q. Now when you got back to Merced you had another conversation, did you not, with Mr. Reilly in your office in which your accountant was present, and you discussed the matter of a private sale by

(Testimony of Edward H. Halton.)
you of these tractors which had had notices pasted
on them at your Los Banos shop?

Mr. Sharff: Will you read the question back,
Miss Reporter?

(Question read.)

Q. (By Mr. Blackstone): If that is too com-
plex a question, I will break it up.

A. We had discussed the sale of these goods ever
since the [78] time we got in the automobile and
started over towards Los Banos in the beginning—
in the morning.

Q. Oh, I see. So you discussed on your trip to
Los Banos? A. All the time.

Q. The matter of how the tractors would be
sold? A. Right.

Q. Now isn't it true that you suggested to Mr.
Reilly that you be permitted to repair those trac-
tors, put them in condition and sell them privately?

A. Sure, after I paid the tax.

Q. Wasn't your first suggestion that from the
proceeds of the sale the taxes would be paid?

A. Yes. But he told me I had to pay the taxes
before we touched the goods after that white paper
was stuck on there. It says, "Property of the
United States." That was the heading of that slip
of paper.

Q. Yes. But your suggestion was first to sell the
property and from the proceeds to pay the taxes—
I mean, let's take it one step at a time, Mr. Halton,
if you can recall.

(Testimony of Edward H. Halton.)

A. My idea in the very beginning was to liquidate these goods for Mr. Watson.

Q. I understand that.

A. And we were thwarted in that because we had to pay the Government the money, which then we didn't know what the amount was, before we touched the tractors, which is what we [79] did.

The Court: The question that is asked is: Did you suggest to Mr. Reilly during these discussions that you would like to sell, repair, and reoutfit the equipment, and sell it at a private sale and reimburse the Government for the taxes out of the proceeds of the sale?

A. I may have suggested that, I may have suggested that.

The Court: Yes. Well, that is what he wants to know.

Q. (By Mr. Blackstone): That is what I am asking. A. I may have suggested that.

Q. And then Mr. Reilly, isn't it true, said that the Government would insist on the taxes being paid first? A. Right.

Q. And then you said, "All right," you would go ahead and do that? A. Yes.

Q. And then didn't Mr. Reilly say that he would have to get approval for that procedure from the collector in San Francisco and that he would let you know?

A. No, sir. He told me he would let me know what the amount of the tax was.

Q. But he told you right then at the time that

(Testimony of Edward H. Halton.)

it was agreeable to go ahead and sell the equipment and to pay the taxes first and then sell the equipment?

A. After he had let me know what the amount was, yes, [80]

Q. That he did not say to you that he would have to check with the Collector in San Francisco?

A. I do not recall whether he said that to me or not.

Q. He may have said that?

A. He may have said that. I—I have no idea.

Q. You do not recall, then, a subsequent telephone call or conversation with Mr. Reilly in which he told you that he had been given authority to permit you to go ahead and make the sale after paying the taxes?

Do you want the question reread, Mr. Halton?

A. Yes.

Mr. Blackstone: I am sorry, Mr. Halton.

Miss Reporter, will you read the question?

(Question read.)

Q. (By Mr. Blackstone): My question may have been a little complex.

A. No, I don't recall that.

Q. In other words, then, as far as you remember, the entire arrangement was worked out during this trip to Los Banos? A. Yes.

Mr. Sharff: When you say "trip to Los Banos," do you include both the trip over and back?

Mr. Blackstone: Yes.

(Testimony of Edward H. Halton.)

Q. Some time during the trip from Merced to Los Banos or back again? [81]

A. Yes, sir.

Q. When the notices were placed on the equipment. Isn't it true that you told Mr. Reilly during the conversations that if you were permitted to sell this equipment at a private sale, you could realize—you thought you could realize enough to reimburse you for the amount owing to you from Watson plus the amount owing to the Government by Watson for the taxes?

A. I hoped to, yes, I hoped to.

Q. And you told him that, didn't you?

A. I hoped to do that, yes.

Q. Now there have been introduced into evidence the two checks which the Halton Tractor Company paid to the Collector of Internal Revenue. They are Plaintiff's Exhibits No. 3 and No. 6.

Now there is nothing on these checks, is there, Mr. Halton, which indicates that the payment was made under protest?

A. No, no, nothing.

Mr. Sharff: Just a second. Your Honor, that was answered before I had a chance to object. The law does not require that the payment must be made with any protest accompanying it. Section 3772, Title 26, says, "Any wrongfully collected taxes may be recovered regardless whether they were paid under protest or not." [82]

The Court: Would you read the question again, Miss Reporter?

Mr. Blackstone: May I say this, your Honor, that the law appears perfectly clear that where the evidence is that one person pays the taxes of an-

(Testimony of Edward H. Halton.)

other voluntarily and without duress that he cannot get it back. I submit that that is the law applicable here and that is the point I am trying to develop.

The Court: Well, the only thing that occurs to me that when you say, "There is nothing on there—"

Mr. Blackstone: They speak for themselves.

The Court: They speak for themselves.

Mr. Sharff: It doesn't have to be with them. That is the point of my objection.

Mr. Blackstone: I was just going on—perhaps if the question could be withdrawn because, as you point out, there is nothing on there.

Mr. Sharff: There is nothing on there to dispute Mr. Blackstone's statement of law. We can argue that, of course.

The Court: Well, that is an argumentative question. The answer will be stricken and the question withdrawn.

Q. (By Mr. Blackstone): Very well. Was any letter of transmittal sent with those checks, with either of those checks, Mr. Halton?

A. I handed one of the checks personally to Mr. Reilly, and [83] the other one I do not recall just what we did with it.

The Court: Well, what he wants to find out is was there at that time any protest made.

Mr. Blackstone: Yes, that is what I want.

A. No, there was no protest made.

(Testimony of Edward H. Halton.)

Mr. Sharff: That question, I presume, is over my objection, your Honor?

The Court: Yes; well, you may object. I will overrule the objection there because that just simply goes—

Mr. Blackstone: It's a question of law involved.

The Court: Well, it goes to a question of fact, did he make any protest at that time, that is, a written protest of any kind.

Mr. Sharff: Well, it may be incompetent, irrelevant and immaterial, your Honor. That is the reason I make my objection.

The Court: Well, I will overrule that objection.

Mr. Sharff: Very well.

The Court: And your answer is that you didn't make any official—any formal protest at that time?

The Witness: I didn't write anything on the checks, nor did I accompany them with a letter, no.

The Court: That followed later; you did that through an attorney? A. Yes, sir. [84]

Q. (By Mr. Blackstone): Now, if I could refer to the Morris Plan chattel mortgage and the subsequent mortgage for a moment, Mr. Halton. As I understood your direct testimony, it was that this—or perhaps it was not on direct examination, I think it was on cross-examination—the second chattel mortgage worked out a different time payment plan? A. Yes, sir.

Q. For Halton—for Lloyd Watson?

A. Yes, sir.

(Testimony of Edward H. Halton.)

The Court: He said that on direct examination, too.

Mr. Blackstone: I was confused.

The Court: He said the purpose of the second—or he didn't say that it was the second mortgage, but he said the refinancing plan was that they—the time of payment would be extended and the amount of payment would be reduced.

Q. (By Mr. Blackstone): Now, one further thing. Wes Durston took back, didn't he, the four tractors that were in the yard at the time that those notices were pasted on them?

A. No. He didn't take them back after we had paid the money. But they stayed there in our yard, oh, for two or three months, as I remember.

Q. And then Mr. Durston took it? A. Yes.

Q. The tractors?

A. Yes. He sent up for them. [85]

Q. And he sold those, or you don't know what he did?

A. He took them away from our place in Los Banos.

Q. So you had nothing further, no further contact in regard to those tractors? A. Right.

Q. You mentioned going through a refund procedure. Did you yourself participate in any conference with the representatives of the Internal Revenue Service in connection with your tax refund claimed? A. No, just I talked to my attorney.

Q. Your attorney was Mr. Jonas? A. Yes.

(Testimony of Edward H. Halton.)

Q. I would like to show you a letter here which bears Mr. Jonas' signature.

Mr. Sharff: May I see it?

Mr. Blackstone: (Showing to counsel.)

Q. And ask you if you saw the letter before it was prepared, or have ever seen a copy of that letter?

A. I have no recollection of ever seeing that letter. It's dated March 15th, 1950.

Mr. Blackstone: May I have this marked as Defendant's Exhibit B for identification?

The Court: All right. Defendant's Exhibit B for identification.

(Whereupon, letter of March 15, 1950, referred [86] to above, was marked Defendant's Exhibit B for identification.)

Q. (By Mr. Blackstone): Did you have a chance to really read the letter and see?

A. Well, not thoroughly; I didn't get down to the last paragraph there.

Q. It was a letter enclosing certain documents, and it's addressed to the Collector of Internal Revenue, a list of these documents, chattel mortgage— A. Yes, I have never seen that letter.

Q. I take it that the documents that are referred to here were documents that you gave to your attorney, Mr. Jonas, in connection with the refund claimed?

A. I think most of them are. I don't think all of those things are.

Q. True. Well, let me be specific, then. En-

(Testimony of Edward H. Halton.)

closure No. 4 refers to a photo copy of conditional sales contract of April 9th, 1947. A. Yes.

Q. That is something you furnished to your attorney? A. Yes.

Q. Item No. 5 is chattel mortgage dated October 7th, 1947. A. Yes.

Q. 6, photo copy of Lloyd Watson's analysis of taxes made by Deputy Collector Francis Reilly of Merced, California. [87] A. Yes.

Q. 7, photo copies of checks No. 4718—\$2,200, and No. 5022 for \$7,777—

Mr. Sharff: Your Honor, I presume that that is all preliminary. It's too early for me to enter an objection, but I too think all this matter is highly irrelevant, incompetent, and immaterial.

Mr. Blackstone: Not a bit, your Honor. I will be perfectly willing to state this point of line of questioning. There is a clear rule that in any tax refund suit the issues are definitely limited to those issues that were made before the Internal Revenue Service in connection with the tax refund suit. I want to establish that the only claims made by Halton Tractor Company before the Internal Revenue Service were claims based on the conditional sales contract of April 9th, 1947, and the chattel mortgage of October 7th, 1947; that there is nothing mentioned before the Internal Revenue Service about the Morris Plan mortgage.

I think it's extremely relevant because with that foundation I think it would furnish a basis for

(Testimony of Edward H. Halton.)

moving to strike all the testimony about the Morris Plan chattel mortgage.

Mr. Sharff: I don't understand the law to be that, your Honor, because out of the facts of this case as we stand here, I think the Government can get no greater rates than [88] they were regardless of what was said to the Government. That is my understanding of the law.

The Court: Yes, but how about having to exhaust your administrative remedies?

Mr. Sharff: They have stated this is a tax refund suit, your Honor. There might be some question about that, but the Government has conceded—

The Court: I understand the basis of the tax refund suit, that you have gone through an administrative procedure of some kind.

Mr. Sharff: Well, I don't—I am not too familiar with those proceedings, your Honor, not having handled them in any respect whatsoever. But in somewhere my recollection is that in the course of those proceedings the Morris Plan mortgage was brought up. Now I can be in error, but—

The Court: Well, that is another matter.

Mr. Sharff: That is my recollection.

The Court: It may very well be. But all Mr. Blackstone is asking, what did go—it may be that during the proceedings before the Commissioner that Morris Plan thing did develop. I wouldn't know that. There might have to be a matter of evidence. Or it may be that you were operating on

(Testimony of Edward H. Halton.)

one theory at that time and now you have another theory at this time.

Mr. Sharff: I would hardly think that is true, your Honor. [89]

The Court: Well, as I say, it's the theory, as I gather from what has been said, predicated the theory of the liability on the Morris Plan chattel mortgage is a theory that has been developed because you were in error as to the time the government lien had attached, isn't that correct, you had thought originally that the second chattel mortgage was sufficient?

Mr. Sharff: I had never thought so, your Honor. I can't speak for my associate counsel who was then handling the case. [89A]

Mr. Blackstone: Well, I believe that the question, the last question has been answered and I submit, your Honor, that it's relevant for the purposes as stated to the Court.

The Court: Well, I will overrule the objection so the record will be clear and the answer will stand.

Mr. Blackstone: I would like to offer this letter in evidence. I don't think that you have any objection to its authenticity, bearing, Mr. Jonas' signature, offering it for the purpose I have elaborated on.

Mr. Sharff: I have none, your Honor, subject to our objection.

The Court: All right. The objection is overruled.

(Testimony of Edward H. Halton.)

It will be admitted into evidence as Defendant's Exhibit B.

(Whereupon, the letter referred to was received in evidence and marked Defendant's Exhibit B.)

The Court: What is the date of that, Mr. Clerk?

The Clerk: March 15th, 1950.

Mr. Blackstone: I think I have no further questions.

Redirect Examination

By Mr. Sharff:

Q. Mr. Halton, I have just a couple more questions.

Mr. Halton, in your conversations with Mr. Reilly do you recall whether or not when he spoke of a mortgage did he identify any particular mortgage as the one he was referring to? [90]

A. Mr. Reilly, in my memory, simply told us that our rights under our mortgage and our conditional sales contract were not good. I mean, they were not—they were behind the government in this case.

Q. At the time you went over at Los Banos with Mr. Reilly, do you know whether or not—did you know whether or not Mr. Durston had repossessed the equipment, the DW10 and D-8's over there for Mr. Watson?

A. No, sir. Mr. Watson was driving the DW10's into our lot. He placed them on our lot, and had

(Testimony of Edward H. Halton.)

told me that he was going to turn them back to Mr. Durston.

Q. Now, you stated that—Mr. Blackstone, rather, asked you if you recalled Mr. Reilly on this trip from Los Banos telling you that you could pay the taxes under protest and then recover them back. Do you recall the place where the conversation took place?

A. I vividly recall that conversation and exactly in the place in the road where the road—the Los Banos highway runs generally east and west and it is—it was at an intersection with the road that goes down to the McNamara Ranch. I don't know the name of the road. But I remember the exact place that I said that—made that remark because I was very heated about it.

Q. Now, tell me this—

Mr. Blackstone: Pardon me. Where you made the remark, I [91] don't think that is responsive to the question. Will you read the question back, please?

The Court: Just a moment.

Mr. Blackstone: I submit that is not responsive to the question. The question was in terms of where did Mr. Reilly tell you about a refund procedure.

The Court: Yes, that is the tenor of the question.

Q. It was in the automobile on the highway 152?

Mr. Sharff: All right.

Q. (By Mr. Blackstone): Do you recall the exact place?

(Testimony of Edward H. Halton.)

A. Right where the McNamara Road comes into the highway.

Q. (By Mr. Sharff): Now, Mr. Halton, in response to one question put by Mr. Blackstone, it was on the subject of the proceeds of these two automobiles; what, if anything, at Los Banos did Mr. Reilly say he would do about the autos when you told him they were up for sale?

A. He told me that they were subject to the same situation that the tractors were, the DW10 tractors were, and that they were, they were subject to having the signs pasted on them in just exactly the same manner. And I told him, as I have testified, that we agreed to turn this money over from the sale of the automobiles and all of the money from the sale of the automobiles directly to him, which we did.

Mr. Sharff: That is all, Mr. Halton.

The Court: Any questions, Mr. Blackstone? Any recross? [92]

Mr. Blackstone: Yes, your Honor.

Recross-Examination

By Mr. Blackstone:

Q. Well, the first question asked you on redirect examination, Mr. Halton, was in regard to what Mr. Reilly told you about your position under the chattel mortgage.

Now, you referred to "our chattel mortgage." What were you referring to when you said "our chattel mortgage"?

(Testimony of Edward H. Halton.)

A. I am looking at the two of them right here.

Q. I think you did say on cross-examination you don't recall specifically mentioning the Morris Plan chattel mortgage to Mr. Reilly.

A. That is correct; that is right.

Mr. Blackstone: I have no further questions.

Mr. Sharff: That is all.

The Court: You may step down.

WESLEY J. DURSTON

called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name for the Court and record.

The Witness: Wesley J. Durston.

Direct Examination

By Mr. Sharff:

Q. And where do you reside, Mr. Durston?

A. In Las Vegas, Nevada, at the present time.

Q. In about 1947 what was your business or occupation? [93]

A. Sale of used construction machinery.

Q. And under what name did you operate that business?

A. I owned the corporation Wes Durston, Inc., of which I was president.

Q. Is that corporation still in existence?

A. Yes.

Q. And you are still president of it?

A. Yes.

(Testimony of Wesley J. Durston.)

Q. And for about how many years were you in the used equipment, construction equipment business? A. About '37 to '50.

Q. Years 1937 to 1950, is that correct?

A. That is right.

Q. During the course of that time did you have a transaction with a man named D. R. Harryman?

A. Yes, I had several.

Q. Yes. Now, on or about March 13th, 1947, was Mr. Harryman indebted to you?

A. Yes. He was before that date.

Q. What? A. He was before that date.

Q. And before that date was his indebtedness owing to you on certain pieces of equipment?

A. That is correct.

Q. And what were they, sir? [94]

A. Well, they were principally four DW10 tractors and scrapers and four D8 tractors.

Q. Prior to March 13th, well, say, March 12th, 1947, was Mr. Harryman in default in his payments to you? A. Yes, very definitely.

Q. Now, on or about March 13th, 1947, was there a four-way transaction involving the four DW10 tractors and the four D8 tractors between D. R. Harryman, Lloyd Watson, yourself and the C.I.T. Corporation? A. Yes.

Q. Will you tell us briefly in a few words the nature of that transaction?

A. Mr. Harryman had purchased from me previous to this March 13th date this aforementioned equipment. And he was in a bad state of delinquency

(Testimony of Wesley J. Durston.)

with the contracts. He came up with this sale to Mr. Watson, Mr. Lloyd Watson. The sale was consummated about that time partially as a relief of the delinquency of Mr. Harryman and partially on the hope that they would be able to pay it out through this new contract that he had recently acquired.

Q. Then they entered into a sale on that date and you were the seller, weren't you? A. Yes.

Q. And then what did you do with that contract?

A. I sold that contract to the C.I.T. Corporation. [95]

Q. I will ask you if you recognize this as an original conditional sales contract involved in this transaction. A. That is correct.

Q. I ask you if on the back of the promissory note attached hereto your signature appears.

A. That is right.

Q. You are the endorser of that promissory note? A. Right.

Q. And that the signatures on the face of it are those of Lloyd Watson and D. R. Harryman?

A. That is correct.

Q. I will ask you if you received the sum of \$51,000 from the C.I.T. Corporation in pursuance of the sale of—

A. In the sale of this document, yes, I did.

Mr. Blackstone: How much was that figure?

Mr. Sharff: \$51,000.

I will ask that that be received as Plaintiff's next in order.

(Testimony of Wesley J. Durston.)

The Court: It will be received into evidence as Plaintiff's Exhibit 7.

(Whereupon conditional sales contract was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Sharff: Your Honor, I presume you would like to inspect this. I will call your Honor's attention to the fact that on the back is the promissory note attached to the contract [96] involved, and then although it is attached on there, in the back is where the endorsement is of Mr. Wes Durston. You have to look underneath it right there, under, to find it.

The Court: Yes. The note is endorsed, is what you mean?

Mr. Sharff: Yes. The promissory note is endorsed by Mr. Durston.

The Court: The assignment—it is signed by Mr. Harryman?

Mr. Sharff: Yes.

The Court: All right.

Q. (By Mr. Sharff): During the year 1947 did Lloyd Watson make the payments to the C.I.T. Corporation required by that contract just received in evidence?

A. He did at no time make distinct payments. There was some reduction of the face of that conditional sales contract, however.

Q. Now, in the fall of 1947 was the contract current? A. No, it was not.

(Testimony of Wesley J. Durston.)

Q. Did you have any conversation with Lloyd Watson about that?

A. We contacted Mr. Watson on two distinct—

Q. When you say "we," you mean yourself?

A. Well, myself, that is right. I contacted Mr. Watson on two distinct occasions in regard to his delinquency.

Q. Do you recall where those conversations took place?

A. They took place in a restaurant at the Hotel Los Banos. [97]

Q. Can you fix the time or the day of those conversations and who was present, if anybody?

A. I couldn't tell you the date. I do know that it was in the late summer or early fall, was the first time that I contacted him on his contract payments.

Q. And what was the conversation the first time?

A. The first time was that his contract had gone rather slowly, but he assured me that he would be caught up and be in good shape. He also at that time elaborated on some of the equipment was idle and perhaps something could be done in that regard.

Q. Can you tell us when the second conversation was?

A. The second conversation was near the end of the year, I would say November or surely in the forepart of December because it was our custom to always clean up all the accounts at the end of the year. We made a very strenuous effort to get everything in as near current condition as we could before closing the annual books.

(Testimony of Wesley J. Durston.)

Q. And what was the substance of the second conversation, Mr. Durston?

A. In the second conversation he come out and flatly stated that he was unable to make the grade, so to speak, and that he would have to return the equipment. And so at that time he promised to bring the equipment in and he suggested that I could get space in the Los Banos yard of the Halton [98] Tractor. And subsequently I did arrange that space and it was brought in there.

Q. Later on did you have a call from Mr. Halton about the fact that Mr. Reilly—that the United States government put some tags on the property? Yes or no?

A. I did, and previous—

Q. Do you know whether on that date of the call from Mr. Halton or before then, Mr. Watson had placed the equipment in the yard of Mr. Halton's company at Los Banos in accordance with your conversation?

A. He had put the equipment, my equipment in the yard, I would say, several days, and even a few weeks previous to the conversation that I had with Mr. Halton in regard to Mr. Watson's tax.

The Court: If you are going into the tax matter now—

Mr. Sharff: I beg your pardon?

The Court: If you are going into the tax thing, we will take our afternoon recess.

Mr. Sharff: This is a good place to stop, yes, your Honor.

(Testimony of Wesley J. Durston.)

The Court: The court will be at recess.

(Recess.)

Mr. Sharff: Would you give me the last question and answer, please, Miss Reporter?

(Record read.) [99]

Q. (By Mr. Sharff): How did you know that the equipment, the four DW10's and I believe one or two D8's were in the Halton Company's yard prior to the date that Mr. Halton called you and informed you about Mr. Reilly's visit?

A. I stopped at the yard on the way to San Francisco, inspected the equipment as to its condition, and proceeded on my trip. And that was several days or even a matter of two or three weeks before I had the call from Mr. Halton.

Q. During the recess, Mr. Durston, you called my attention to certain writing on the back of this conditional sales contract which is here identified as Plaintiff's No. 7.

Now, C.I.T. Corporation is here in print, that is crossed out with an ink line and we have Wes Durston written above it and some initials, D.R.H.

A. That was put in after I repurchased the contract from the C.I.T. Corporation in order to put myself in the proper relative position as a repurchaser of the contract.

Mr. Sharff: Does your Honor wish to note what he is referring to there? The changes right on that

(Testimony of Wesley J. Durston.)
spot were made after he received it back from the
C.I.T. Corporation.

The Court: All right.

Mr. Sharff: You have photostats of these two
documents, I believe, Mr. Blackstone?

Mr. Blackstone: Yes.

Q. (By Mr. Sharff): I show you a document
bearing the stamped [100] number 701092 in the
upper righthand corner, and ask you what that
represents.

A. Well, it's further evidence of the nature of
my guarantee to the C.I.T. Corporation.

Q. Is it connected with the document already
received as Plaintiff's No. 7?

A. That is right.

Mr. Sharff: I ask that this be received as Plain-
tiff's next in order, your Honor.

The Court: The two of them are one?

Mr. Sharff: One. I will get the next one after
identifying it.

The Court: All right. Plaintiff's Exhibit 8.
What is the document?

(Whereupon assignment to be signed by
seller-assigner was received in evidence and
marked Plaintiff's Exhibit No. 8.)

Mr. Sharff: It's headed, the printed document,
assignment to be signed by seller or assignor, I be-
lieve it says, contract of Lloyd Watson addressed
Los Banos, California. It is assignment to the C.I.T.

(Testimony of Wesley J. Durston.)

Corporation. It is signed on March 7th, 1947, by Wes Durston.

Q. I show you another document, Mr. Durston, and ask you what that represents.

A. Well, it's just part of the clerical work of the C.I.T. [101] Corporation whereby they acknowledge that they have in their possession a valid contract and comment up here that the proceeds were sent to Wes Durston, Inc.

Q. This refers also to the same previous exhibits, same transactions of the previous exhibits?

A. Yes.

Mr. Sharff: I ask that that be received next in order for the plaintiff, your Honor.

The Court: All right. Plaintiff's Exhibit 9.

(Whereupon C.I.T. acknowledgment was received in evidence and marked Plaintiff's Exhibit No. 9.)

Mr. Sharff: Would your Honor like to look at this to see the nature of the documents, see the kind of invoice statement they hand out?

The Court: Yes.

Q. (By Mr. Sharff): Now, Mr. Durston, did you receive a telephone call from Mr. Halton with reference to having had a visit from Francis J. Reilly, agent of the Internal Revenue Department of the United States? A. I did.

Q. Do you recall where you received that call?

A. I received it in my office in Los Banos.

(Testimony of Wesley J. Durston.)

Q. And will you tell us what Mr. Halton told you that Mr. Reilly had said or done?

A. Well, he advised me that this was a tax lien put against [102] my property up there. And I said, "Well, that can't be so. I have repossessed that property and the title remains mine until it is entirely paid for. There is a conditional sales contract in force and they have no right to put a lien—rather,"—

Mr. Blackstone: May I interrupt at this moment? I am going to move that the testimony be stricken. It is hearsay, and I don't see that it has any bearing on the transaction that took place.

Mr. Sharff: I think it does, your Honor. It is part of the—it comes under the heading of an oral act. It's merely—he was—Mr. Halton was merely transmitting statements made by Mr. Reilly including this man's action later on, and paying \$3,900 which were claimed for him.

Mr. Blackstone: There is no showing that this had been brought to the attention of Mr. Reilly or has any connection with the government agents at all. It is purely hearsay and should be stricken.

Mr. Sharff: I don't think it's hearsay at all, your Honor. It's under the heading of oral acts.

The Court: Well, it could be a broad interpretation of it. I will overrule the objection because it is germane to this whole issue. However, I am not going to accept it for proof of what Reilly told Mr. Halton. That simply as a basis for the conduct of this man. [103]

(Testimony of Wesley J. Durston.)

Mr. Sharff: That is what I mean, your Honor. It's a matter of an oral act, the fact that the statement was made, whether it is true or not. It is not testimony to that. It is merely a fact that such a statement was made at a certain time. That is all it is offered for.

Mr. Blackstone: Was it offered to prove the truth of the statement made—

Mr. Sharff: No. It is only offered to prove that Mr. Halton transmitted to Mr. Durston the acts of Mr. Reilly, whether it be a true statement as to what Mr. Reilly said.

Mr. Blackstone: Then whatever comments were made by Mr. Durston certainly haven't any competency here or relevancy. That is what I move to strike.

The Court: I will deny the motion to strike. But I don't think that the argument is particularly necessary. It's what Halton told him, that is the important thing.

Mr. Sharff: Yes, I agree with your Honor on that.

And what did Mr. Halton say after you mentioned your conditional sales agreement, Mr. Durston?

A. He said that our possession, even though it was a conditional sales contract, was inferior to the possession of the government. And I immediately questioned that. But I was not a lawyer and I didn't know authorities. And he said he was quoting Mr. Reilly.

(Testimony of Wesley J. Durston.)

Q. Did Mr. Halton—— [104]

Mr. Blackstone: May I make my motion to strike that testimony, too, on the same grounds, your Honor, that it is hearsay?

The Court: Motion denied.

Q. (By Mr. Sharff): And, Mr. Durston, did Mr. Halton make a statement to you as to what action the United States government would take if the taxes were not paid?

A. He told me that they would repossess the equipment, the tractors, and sell them to satisfy their account.

Mr. Blackstone: It's understood my objection to strike goes to this entire line of testimony?

Mr. Sharff: So stipulated.

The Court: Your objection will be to it and your motion to strike will go to it. The objection will be overruled. The motion is denied.

Mr. Sharff: As a result of that conversation, did you pay certain monies to Mr. Watson to be applied on the payment——

Mr. Blackstone: I beg your pardon?

Q. (By Mr. Sharff): Withdraw that. As a result of that conversation did you, Mr. Durston, pay certain monies to Mr. Halton to be used in paying part of Mr. Lloyd Watson's taxes to the United States government?

A. At the time that I talked to Mr. Halton, he did not know the amount of the tax lien and he advised me that he would let me know later and we

(Testimony of Wesley J. Durston.)

would arrive at an equitable proportion, [105] at which time I would send him a check.

Q. And was there such a conversation later on that subject?

A. I believe that his man, Mr. Treadwell, came down to Los Angeles several weeks later with that information. And whether we mailed the check to Mr. Halton at that time or whether we gave it to his man, I do not remember.

Q. Do you remember what the amount was?

A. \$3,900.

Q. All right. Now, Mr. Durston, after you had repossessed the equipment from Mr. Watson——

Mr. Blackstone: I object to that. It assumes something not in evidence.

Q. (By Mr. Sharff): Well, I will withdraw that statement. After the equipment was in the yard of Halton Tractor Company, did you have a transaction with the C.I.T. Corporation in regard to the balance due under the conditional sales agreement with Mr. Watson? A. I did.

Q. What was that transaction?

A. Our relations with our financial agent is always very close. And I had to advise him immediately of any movement of any major portion of our equipment that they have on contracts. And in that relation I advised him that I had repossessed the equipment from Mr. Watson and now had it stored in yards of Los Banos. And so they immediately made [106] demand to me for the full payment of the balance of the contract and enforced——

(Testimony of Wesley J. Durston.)

Mr. Blackstone: I am going to move to strike the testimony, that it is a conversation where the person hasn't any connection with the government. I think it is hearsay and not admissible.

The Court: Well, what does it have to do with this?

Mr. Sharff: Well, it leads up to the fact, your Honor, that Mr. Durston was required by the C.I.T. Corporation to pay \$30,100 on March 21st, 19—

Mr. Blackstone: We can shorten this. I will stipulate that that was paid. I haven't any reason to doubt that.

Mr. Sharff: Well, that is all I am leading up to, showing how it happened.

The Court: Well, then, the objection is good in this case. But do you want to accept the stipulation?

Mr. Sharff: Is the stipulation, I take it, Mr. Blackstone, from what you have said, that on March 21st, 1948, Wes Durston, Inc., a corporation, under its guarantee of the conditional sales contract and the promissory note received in evidence as Plaintiff's Nos. 7 and 8, was required by the C.I.T. Corporation and did pay to them the sum of \$30,100?

Mr. Blackstone: Under pursuance to the guarantee.

Mr. Sharff: Pursuant to the guarantee.

Mr. Blackstone: Which is shown by the documents in [107] evidence.

Mr. Sharff: That's right.

Mr. Blackstone: That's right.

(Testimony of Wesley J. Durston.)

The Court: All right.

Q. (By Mr. Sharff): Mr. Durston, after you paid the C.I.T. Corporation, did you move the equipment to Los Angeles?

A. No. I didn't have occasion to move it until late in the summer. I believe it was August.

Q. And tell me, how did you move the equipment to Los Angeles?

A. With our own trucks.

Q. And can you tell us how much that cost you?

A. The records seem to indicate that it was between twelve and fourteen hours per trip and there was five trips from Los Banos.

Q. Just a second. Let's get this into figures. You say 12 to 14 hours, 12 hours?

A. Well, it would be approximately \$100 cost, let's put it that way, per trip.

Q. \$100 to move each tractor from Los Banos to Los Angeles?

The Court: He said five trips, \$500.

The Witness: Yes, that's right. And then I might add there was one tractor that had to be brought down from Lake County, which was further north. And it would certainly be \$125 to \$130 for that sixth trip. [108]

Q. (By Mr. Sharff): Were all the tires on the tractors?

A. No, they were not on my initial examination of the equipment. It was very despairing indeed. It was missing tires and tires that were flat and

(Testimony of Wesley J. Durston.)

broken up motors and the equipment was in ill repair generally.

Q. Do you recall particularly at this time whether you had to replace any particular tires on these tractors, Mr. Durston?

A. I had to replace two of the large tires. I distinctly recall they are quite expensive and several of the small ones had to be repaired or replaced.

Q. How much would the two large tires cost you?

A. Between five and six hundred dollars apiece.

Q. That would be \$1,000 then for the two tires?

A. That's right.

Q. After you took the equipment to your yard in Los Angeles, was it sold as is?

A. It was—it had to be repaired somewhat. It had to be made to run and then it was sold as is, yes, that's right.

Q. Do you have any records—any more—as to what it cost you to repair it and—

A. No, I do not.

Q. No more records. Well, Mr. Durston, do you know eventually what happened to this equipment?

A. I sold the four DW10's to either Hass Construction Company or Haas Construction Company, I don't recall for sure [109] which—they have since gone out of business—for a total of \$20,000 for the four units.

Q. That is four DW10's, then, went for \$20,000. Do you recall that transaction personally? Do you?

(Testimony of Wesley J. Durston.)

A. Very distinctly. I am in charge of all sales.

Q. We have also two D8's which you took to Los Angeles under this contract, is that correct?

A. Yes. One of those—

Q. Do you recall the sale of these D8's?

A. One of those was fairly recent, D8, and it sold for \$6,500.

Q. And what about the other D8?

A. The other one was an older one. It sold for \$4,000.

Q. Do you recall to whom those sales were made? A. No, I do not.

Q. Have you searched for records to find these?

A. We have made quite an extensive examination and we failed to find—

Q. Mr. Durston, the bookkeeper you had at that time, is he still alive?

A. No. He passed away last July, '54.

Q. Yes. And your present bookkeeper is unable to locate any exact records? A. That's right.

Q. And your brother, I think, was there in the business with [110] you at the same time also, was he?

A. He was my active manager and he remained on the place all the time.

Q. Is he alive?

A. No. He passed away on December 27th of this year.

Q. You mean January 27th.

A. This year.

Mr. Sharff: I think that is all.

(Testimony of Wesley J. Durston.)

Cross-Examination

By Mr. Blackstone:

Q. Mr. Durston, I gather from your testimony that you had no personal conversations with Mr. Reilly whatsoever? A. That is correct.

Q. You never submitted a copy of the conditional sales agreement to anyone connected with the Internal Revenue Service, did you?

A. No, I never did. Well, I qualify that statement by saying that Mr. Jonas has since presented it.

Q. Well, I mean until the claim for refund was filed. A. That is right, yes.

Q. Now, I gather from the exhibits that have been introduced that when you first turned over this conditional sales agreement to the C.I.T. you paid the amount—or you received the amount of the charge there shown on your Exhibit No. 9. This exhibit shows—well, the settlement figure, [111] \$51,000. Is that the amount you received?

A. That is correct, yes.

Q. And then you said the C.I.T. Corporation—we stipulated, I think it was March 2nd, 1948—you were under your guarantee, you had to pay them \$30,100? A. That's right.

Q. And it was then, was it not, that you put your name back in here on the conditional sales agreement? A. That's right.

Q. As the assignee, whereas theretofore it had

(Testimony of Wesley J. Durston.)
been C.I.T. Corporation? A. Yes.

Q. And that was done some time around March 2nd, I suppose, is that correct, 1948?

A. That's correct.

Q. Now, in regard to the sale of this equipment that you took back from the Halton yard, did the sales you have testified to include the tractor you brought down from Lake County?

A. Yes, that's right. That was—

Q. Was that one of the D-8's? A. Yes.

Q. Which one was it?

A. One H-4413, I believe.

Q. Was that the one that sold for \$6,500?

A. That's right. [112]

Q. Well, now, the conditional sales contract provides for four D-8 caterpillar tractors and you only told about selling two of them. What happened to the other two?

A. Mr. Watson or Mr. Harryman—I don't know which one—had sold those two tractors before and had transmitted the entire proceeds to the C.I.T. in Los Angeles.

Q. I see. That is one of the reasons perhaps why the net amount owing under the conditional sale when C.I.T. retransferred it to you was not \$51,000 but was \$30,100? A. That's right.

Mr. Blackstone: I see. I have no further questions.

Mr. Sharff: I have several questions I overlooked on direct examination, your Honor, if I may ask them.

(Testimony of Wesley J. Durston.)

The Court: All right. You may reopen your direct examination.

Further Direct Examination

By Mr. Sharff:

Q. Mr. Durston, in any of the conversations with Mr. Halston was anything said about any future action you might take in connection with the money to be paid on account of Mr. Watson's taxes?

A. It was distinctly understood the effort be made, and essentially would have to be made, by Halton Tractor Company because they are the ones that paid to the government.

Q. Withdraw that. You don't understand what I mean. Did Mr. Halton say to you what procedure might be taken in any way [113] to recover the monies that were being paid?

A. I don't recall he said exactly what the procedure would be. But he said an effort was made. He said, "You have to pay this temporarily to clear it up, but he'll get it back."

Q. Well, when you paid the \$3,900 did you understand then that proceedings would be taken against the United States government to have that money repaid? A. That's right.

Q. Yes?

A. It was paid distinctly in protest, as far as I was concerned.

Q. All right. Tell me this, in your opinion as a dealer in this class of merchandise, the prices at

(Testimony of Wesley J. Durston.)

which you sold them which you have related here on the stand: Was that the highest and best price obtainable on the market at that time?

A. They were very satisfactory prices in relation to the condition of the equipment.

Mr. Sharff: Yes. That's all.

Mr. Blackstone: No further questions.

The Court: All right. You may step down.

Mr. Sharff: I believe Mr. Blackstone wishes to call Mr. Reilly out of order, your Honor. It is perfectly agreeable to me.

The Court: He may.

Mr. Blackstone: May it please the Court, what we had in [114] mind, Mr. Reilly would like to get back to Madera tomorrow on business and I had an appointment in Sacramento tomorrow. I wonder if it would be at all possible after Mr. Reilly's testimony—I think we could finish today. There are one or two possibilities: Either we would brief the issues as they have developed up to now and not go into the somewhat complicated bookkeeping arrangement which would come in issue only if the first issue is decided against the government. Do you see what I mean?

We have this problem as to what were the costs of sale, as far as Halton Tractor is concerned, which would become relevant only if the contention of the government is not sustained that this was a voluntary payment. And I think—I anticipate that that could be a rather involved technical cross-examination on my part. It would be perhaps possible

for me to sit down outside of court to go over the books and we might simplify that aspect of the case. That is entirely up to your Honor's view of the matter and whatever would be agreeable to plaintiff's counsel.

Mr. Sharff: Well, it isn't a question—I am always willing to accommodate you, Mr. Blackstone. I know your desire to get to Sacramento, but Mr. Halton and Mr. Bostick are both from Merced. They have been up here since yesterday and they would rather finish tomorrow if it is agreeable to your Honor. [115]

The Court: Which court will you be in contempt of, Mr. Blackstone?

Mr. Blackstone: I won't be in contempt. It's just a matter of interviewing witnesses on another case and it's just a matter of putting it over. It's just a matter of convenience to me.

The Court: Well, it's a question of balancing convenience. I think we ought to conclude the matter if we can. I don't know what the answer is. But these people come from out of town, Mr. Blackstone, and I want to do my best to accommodate them. Then if you want to call Mr. Reilly—

Mr. Blackstone: If that is agreeable.

Mr. Sharff: —certainly I have no objection.

FRANCIS J. REILLY

called as a witness on behalf of the defendant;
sworn.

The Clerk: State your full name for the Court
and jury.

The Witness: Francis J. Reilly.

Direct Examination

By Mr. Blackstone:

Q. Mr. Reilly, where do you reside?

A. Madera, California.

Q. And what is your occupation?

A. Collector for the Internal Revenue Service.

Q. How long have you been so employed?

A. Oh, since about 1940—'41.

Q. Were you a deputy collector for the Internal
Revenue [116] Service in 1947 and 1948?

A. I was.

Q. Where were you stationed?

A. 1947 in Merced.

Q. In Merced?

A. Yes, sir. Part of the time I was—August
through '47, '48 and '49. Prior to that I was in
Fresno.

Q. When did you first discover that there was
an outstanding tax liability of Lloyd Watson?

A. When I was transferred from Fresno to the
Merced office. The cases were transferred to me by
the party who had them before who was leaving the
Department.

Q. And when would that be?

(Testimony of Francis J. Reilly.)

A. August of 1947.

Q. Had you received warrants of restraint in connection with the tax liability of Lloyd Watson?

A. Yes. There were warrants of restraint.

Q. Did you contact Lloyd Watson about paying the tax liability? A. On numerous times.

Mr. Blackstone: Would you mark this as Defendant's next exhibit for identification?

The Court: Defendant's Exhibit C for identification.

(Whereupon, financial statement referred to was marked Defendant's Exhibit C for identification.) [117]

Q. (By Mr. Blackstone): Mr. Reilly, I show you Defendant's Exhibit C for identification and ask you if you can identify what that exhibit is?

A. Yes. It's a financial statement of Lloyd Watson that he gave me as of 8/23/47.

Mr. Blackstone: I ask that be offered in evidence, your Honor.

Mr. Sharff: We object to it, your Honor, as being incompetent, irrelevant and immaterial. It can in no way be binding upon us, your Honor.

Mr. Blackstone: Your Honor, it's offered to show—I think there has been enough testimony here that they have placed in issue or attempted to, the good faith of Mr. Reilly in this whole transaction. If they are willing to stipulate that that isn't in issue, perhaps this exhibit can be withdrawn.

(Testimony of Francis J. Reilly.)

Mr. Sharff: I don't know what you mean by good faith, Mr. Blackstone. I haven't used the word duress here, meaning putting a gun at a man's head, no, or placing a man in fear of injury to his person. But my only contention is what we call duress of goods under the decision of the United States courts. Now, I don't know what you mean by good faith. Have I clarified the atmosphere in that respect?

Mr. Blackstone: Well, I intend to establish by this exhibit and through further testimony of Mr. Reilly that he [118] had no information about any conditional sales agreement, and that the only information we had was about the chattel mortgage, which was filed for record after the tax lien was filed. And I think this is relevant in that connection.

The Court: I will overrule the objection. It will be admitted into evidence as Defendant's Exhibit C.

(Whereupon, Defendant's Exhibit C, previously marked for identification, was received in evidence.)

Q. (By Mr. Blackstone): Did Mr. Watson at any time tell you that he was purchasing equipment under conditional sales agreements?

A. He did not.

Mr. Sharff: I don't think—just a second—the same objection, your Honor.

The Court: Well, I will overrule the objection.

(Testimony of Francis J. Reilly.)

Q. (By Mr. Blackstone): Your answer was—

A. He did not.

Q. Now, it has been stated heretofore, I think the plaintiffs are willing to stipulate, that a tax lien was filed on September 16, 1947. I have a certified copy from the County Recorder of the tax lien which I should like to produce in evidence at this time.

The Court: All right.

Mr. Sharff: No objection, your Honor.

The Court: It will be admitted into evidence as Defendant's [119] Exhibit D.

(Whereupon, notice of tax lien under Internal Revenue laws was received in evidence and marked Defendant's Exhibit D.)

Q. (By Mr. Blackstone): I show you Defendant's Exhibit D, Mr. Reilly, which is a notice of tax lien filed September 16, 1947, the office of the County Recorder of Merced County. Are you acquainted with the filing of that notice?

A. Yes, sir.

Q. At the time that notice was filed had you checked the records of the County Recorder's office in regard to chattel mortgages outstanding against Lloyd Watson? A. I have.

Q. What did you discover?

A. I found none.

Q. Thereafter did you have occasion to discover a chattel mortgage which has been introduced into evidence and is dated October 2nd, 1947?

(Testimony of Francis J. Reilly.)

A. I did.

Q. When did you first discover that chattel mortgage?

A. Oh, probably two or three weeks after it was recorded.

Q. Would you state—

A. I was up at the courthouse checking for—on this same deal after talking to Mr. Watson—

Q. Would you state what subsequent steps you took in connection [120] with the collection of taxes on the assessment against Lloyd Watson?

A. I did everything possible to collect the money from Mr. Watson. I contacted him numerous times. I asked him when he was going to pay it. He kept telling me that as soon as the other deal was finished, which he had in court, he would be able to pay all taxes.

Q. When was it that you discovered that he had some equipment—that some tractors that had been—

A. Well, I knew he was a land leveler, so he must have the equipment.

Q. Well, did you discover from any source that these tractors were going to be placed in the possession of Halton Tractor, or had been placed in the possession?

A. I did not know that until Mr. Watson called me and told me he had taken them into Mr. Halton's yard into Los Banos.

Q. When did he tell you that, if you can remember? A. Probably in November, I think.

(Testimony of Francis J. Reilly.)

Q. Of 1947?

A. I think so; November, or it was shortly after he brought the equipment into Mr. Halton's yard in Los Banos he called me.

Q. Did you thereafter have a conversation with Mr. Halton about this property?

A. I did. [121]

Q. And when was the date of that conversation, the first one you had, as far as you can fix it?

A. Gee, I would say the latter part of October or November. November.

Q. 1947? A. 1947, yes, sir.

Q. Where did the conversation take place?

A. The first conversation took place in Mr. Halton's office.

Q. And what was the conversation you had at that time?

A. I told Mr. Halton that we had tax liens against Mr. Watson and that the government was going to take steps to take the machinery that Mr. Watson possessed and would sell it, if necessary, to recover the taxes. Now, these liens were never filed against either Mr. Halton or against Mr. Durston.

Mr. Sharff: I ask that it be stricken, your Honor.

Mr. Blackstone: I agree to that.

The Court: All right. The last part will be stricken.

Q. (By Mr. Blackstone): What statements

(Testimony of Francis J. Reilly.)

were made to you at that first conversation by Mr. Halton?

A. Oh, Mr. Halton told me that he had certain interests and that he had a mortgage, chattel mortgage, recorded at the courthouse which I knew because I had checked on it. And I told him that my —that the government lien was prior to his chattel mortgage and that the government had first crack at [122] that machinery, or at the equity that Watson had in the machinery.

Q. Did Mr. Halton tell you about a conditional sales contract— A. He did not.

Q. —that he had. Would you wait until the question is finished, Mr. Reilly? He did not, you say? A. He did not.

Q. Did he mention to you in that conversation anything about the Morris Plan chattel mortgage?

A. No, sir, he did not.

Q. During the conversation did Mr. Halton ask you what steps could be taken to have the government lien released from the property?

A. He did.

Q. And what did you say to him?

A. I told him the only way the government would release the lien was a payment of taxes.

Q. Did you tell him that he, individually, was liable for the tax assessment made against Lloyd Watson?

A. I don't think I did. I don't recall ever telling him that at all.

Q. Have you ever told any taxpayer that?

(Testimony of Francis J. Reilly.)

A. No, sir.

Q. I mean, any third party? [123]

A. No, sir.

Mr. Sharff: I object—all right; let it go in. The Judge won't pay any attention to it.

Q. (By Mr. Blackstone): At that time did you give Mr. Halton an estimate of what the tax liability of Lloyd Watson would be?

A. I may have given him an estimate, but I guessed at it because I didn't know the exact figures which I told him.

Q. Is that substantially all of the first conversation, or are there other things that were discussed there bearing on the matter of the government tax lien?

A. No. I don't think there was any more of the things discussed.

Q. When was the next time you had a conversation with Mr. Halton?

A. I guess the next time was when we took the trip to Los Banos when I put the pasted signs on the equipment over in his yard that it was now the property of the United States Government.

Q. And during that trip would you relate the conversation you had with Mr. Halton in regards to the government tax lien and his interest in the property?

A. Well, if I recall right, I told Mr. Halton that the government was interested in the equity that Mr. Watson had in the property. But we put our signs on all property at the [124] time that was

(Testimony of Francis J. Reilly.)

in the possession of Mr. Watson regardless of whose yard it was in because I did not know at the time that Mr. Halton had repossessed the property. So I just—in other words, it was called Watson's property or equipment so the signs went on all of it.

Q. Did you state to Mr. Halton that under the procedures, as you understood them, the government could go ahead and hold a restraint sale on this property? A. Yes.

Q. What did he state when you informed him of that?

A. He told me that he had an equity in the property. And I realized that and I told him that we had a lien filed prior to his recordation of his chattel mortgage. That was the only thing that I knew about.

Q. During this conversation did he mention his conditional sales contract?

A. No, sir, he did not.

Q. During this conversation did he mention the automobiles which were not then at the Los Banos plant?

A. No, I don't think so. But I think they did mention it to me when we got over to the yard in Los Banos.

Q. What did he say to you about these two automobiles?

A. He told me the two automobiles were in the —at McAuley's Motors in Merced. And I told him then that I would have to put a sign on those, too;

(Testimony of Francis J. Reilly.)

as long as they had [125] anything to do with Mr. Watson that we had to do that.

Q. What did he state would be done with those automobiles?

A. Well, he told me they were going to be fixed up and sold.

Q. And did you agree to that or what was the—

A. No, I did not agree to anything because I couldn't until I got an O.K. from San Francisco.

Q. Did he make any statement to you about paying the proceeds from the sale to the—

A. At that time, no, sir.

Q. Do you recall any further conversation on this trip to Los Banos when you placed these notices? A. No, I don't.

Q. Do you recall the conversation related by Mr. Halton in which he accused the government of Gestapo tactics?

A. No, I did not recall that.

Q. During that trip did you advise Mr. Halton that the taxes could be paid under protest and a refund made for the taxes? A. I did not.

Q. Do you recall any time when you suggested to Mr. Halton that a refund could be made by following the normal refund procedure?

A. I do not recall that.

Q. When was the next conversation, as you recall, with Mr.— [126]

A. The next conversation I recall was in Mr. Halton's office.

(Testimony of Francis J. Reilly.)

Q. That was after your trip to Los Banos?

A. That was after our trip to Los Banos. And that was at the time that Mr. Halton suggested that he take the machinery to Merced, fix it up and sell it. And I told him I would have to get an O.K. from San Francisco before I could do anything.

Q. Did he, in that conversation, make any suggestion in regard to payment of the taxes from the proceeds of the sale?

A. Yes. He said he would like to sell the machinery and pay the taxes. And I told Mr. Halton that the taxes had to be paid before the machinery was sold.

Q. Did you agree with him at that time that he could follow that procedure?

A. No. I couldn't agree with him because I hadn't had permission from the Department to do that.

Q. What did you do thereafter?

A. I went back to the office and called San Francisco, explained the situation to them and asked if it was O.K. because Mr. Halton was a respectable businessman. And I explained to them and they said, "Yes, if Mr. Halton wants to do it that way, it was O.K."

Q. Did you communicate that information to Mr. Halton? A. I did to Mr. Halton. [127]

Q. Was that by telephone or personal visit?

A. I don't know. I think it was by telephone.

Q. Thereafter you received the two checks that have been introduced into evidence, is that correct?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. For \$2,200 and for \$7,700 some odd?

A. Yes, sir.

Q. Was there any further transaction that you had in connection with this—

A. No, I don't think so. Oh, afterward when I finished the audit of Mr. Watson's taxes I sent that yellow paper—it's an exhibit there—or brought it over to him, to Mr. Halton, showing him the exact amount of taxes owed.

The Court: Mr. Reilly, what did Mr. Halton say when you told him that you had permission from San Francisco to permit a sale of the equipment with the proceeds to be paid out of the—

A. He said he would bring the equipment to Merced and fix it up and would pay the taxes.

Mr. Blackstone: I think you misunderstood the Court's question.

The Court: Well, as I understand you—I just want to be sure—as I understand your testimony, you say that Halton made the suggestion that the equipment could be sold at a private sale and the proceeds—and out of the proceeds of the [128] sale the taxes would be paid?

The Witness: Yes, sir.

The Court: You said you had to get permission from San Francisco from that, that you had to get authority from the Collector's office?

A. Yes, sir.

Q. That you phoned San Francisco and got authority and so advised Halton?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. That you had authority to permit that procedure to go forward? A. Yes, your Honor.

Q. Now, then, what did Halton say in response to that advice?

A. Well, Mr. Halton said that doing it that way he could get more for the equipment than he could get at a forced sale.

Q. What did he say he would do, if anything?

A. He said he would agree to pay the tax if we would agree to that stipulation.

Q. (By Mr. Blackstone): If I understand correctly, Mr. Reilly, the proposal you submitted to San Francisco was that the tax first be paid and then— A. Yes, sir.

Q. —and then the sale be made?

The Court: Was that your understanding, that he first [129] pay the tax? The question I asked you and I just—first of all, let's go back to Halton's suggestion, the one that he made. Did he make the suggestion that he, Mr. Halton, be allowed to repair the property and sell it?

The Witness: Yes, sir.

The Court: And then out of the proceeds of the sale pay the taxes?

The Witness: That was the first suggestion.

The Court: All right. Now, then, did you tell him that you had to get authority or permission to do that?

The Witness: That's right.

The Court: All right, then. What did you tell

(Testimony of Francis J. Reilly.)

him and then you say you called San Francisco, and what authority did you get?

The Witness: I got the authority to allow him to bring the machinery over to Merced and fix it up. But the tax had to be paid before the machines were sold because we could not release a lien without the money.

The Court: All right. That's what you advised Halton?

The Witness: Yes, sir.

Q. (By Mr. Blackstone): And Mr. Halton agreed to follow that procedure? A. Right.

Q. To pay the tax first?

A. That's right. [130]

Q. And then to sell? A. Right.

Q. But in regard to the automobiles, the automobiles were sold first, is that correct?

A. That's right.

The Court: You had never even touched the automobiles?

The Witness: I did not even put a sign on them.

Q. (By Mr. Blackstone): Now, I want to find out if at any time during these conversations with Mr. Halton did he ever bring to your attention the conditional sales contract that he had?

A. I do not recall of ever hearing of the conditional sales contract.

Q. I will ask the same question in regard to the Morris Plan chattel mortgage.

A. I never heard of it.

Q. As far as you knew, the only interest he had

(Testimony of Francis J. Reilly.)

was the interest that appeared in the October 2nd, 1947, chattel mortgage? A. Right.

Q. Did Mr. Halton at any time in any of these conversations with you mention to you that some of this equipment was being purchased by Lloyd Watson under a conditional sales contract from Wes Durston? [131]

A. I never even heard of Mr. Durston until a few months ago.

Q. Can you answer the question, Mr. Reilly?

A. I did not know it, no, sir.

Q. Did Mr. Halton state to you in any of these conversations that if permitted to make a private sale of the equipment—

Mr. Sharff: Please, now, your question is leading and suggestive enough already, Mr. Blackstone. I am going to interrupt you at this time and object to it accordingly. It is leading and suggestive as far as he has gone already, your Honor. I hope you will pardon the interruption.

The Court: All right. Mr. Blackstone, you reframe your question then. Do you want—I don't know what the purpose of it is.

Mr. Blackstone: I just wanted to ask Mr. Reilly if he recalls any conversation in regard to the advantage as opposed to disadvantage of a private sale or forced sale, and what Mr. Halton may have said about that, if anything.

Mr. Sharff: That is a permissible question. I have no objection to that.

The Witness: Mr. Halton told me that if he

(Testimony of Francis J. Reilly.)

was allowed to fix up the machinery that he was sure he would get what Watson owed him plus the taxes out of the machinery; where at a forced sale, he knew they was out, they would not [132] get that much.

Mr. Blackstone: I think I have no further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Sharff:

Q. Mr. Reilly, I understood you testifying to something about checking the County Recorder's records in Merced in respect to Mr. Watson. Did I understand you correctly? A. Yes, sir.

Q. And for what period of time did you check them the first time you went to the County Recorder's office?

A. I don't quite understand what you mean.

Q. Well, when you searched the County Recorder's office at Merced, as I understood you did, over what period of time did you look?

A. I went back four or five years to see if there was any mortgages or liens filed against Mr. Watson at that time.

Q. And you tell us in that search you—

A. I found none.

Q. You didn't find the Morris Plan mortgage which was recorded on March 29th, 1947?

A. That's right. I found the mortgages. But ac-

(Testimony of Francis J. Reilly.)

cording to that mortgage book in the County Recorder's office, those mortgages had been cleared.

Q. You are testifying that you found on the books that the [133] Morris Plan mortgage had been released?

A. I did not know anything about the Morris Plan mortgage. I saw a couple of mortgages in there, or filed with Halton's—Mr. Halton's name on there. But I do not recall the Morris Plan at all. I don't even remember seeing it in the book.

Q. Well, probably you didn't intend to say Mr. Halton; did you intend to say Mr. Watson?

A. Mr. Watson, yes; sorry.

Q. You did find where Mr. Watson had given several mortgages, is that correct? A. Yes.

Q. And can you recall at this time definitely that one of them was not the Morris Plan mortgage?

A. No. I cannot because I did not see it. I didn't see anything about the Morris Plan in there.

Q. Well, let's get that definite. You did see several mortgages, is that correct? A. Yes, sir.

Q. Are you testifying under oath now that those you saw were not one to the Morris Plan?

A. Right.

Q. You didn't see that one of March 29th?

A. I did not, sir.

Q. Now, going to another subject, you testified that Mr. Watson phoned you and told you his equipment was in the yard [134] of the Halton Tractor Company at Los Banos, is that correct?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. Did you understand his statement to mean that all of the equipment which he owned was there on the Los Banos lot?

A. I took that for granted.

Q. All of it? A. All of it.

Q. Now, I will ask you to refresh your recollection. Didn't that conversation take place in Los Banos in person with Mr. Watson on the street?

A. No, sir.

Q. Didn't he tell you then and there that it was all over at Halton's place?

A. No. He called me, Mr. Watson called me.

Q. Well, then, you knew that all of the equipment Watson had was over at Los Banos, didn't you? A. I thought it was, yes, sir.

Q. And you knew, Mr. Reilly, didn't you, that Mr. Watson's equipment was subject to contracts of conditional sale, didn't you?

A. I did not, sir.

Q. You did not? A. I did not.

Q. Where is that financial statement? I ask you to inspect this financial statement, Mr. [135] Reilly.

A. There is nothing in here that says he has notes payable, accounts payable, and so forth. There is nothing in here that says anything about conditional sales contracts.

Q. I ask you to look where it says, "Contracts on Equipment."

(Testimony of Francis J. Reilly.)

A. Well, that doesn't necessarily have to be a conditional sales contract.

Q. You mean you don't understand where it says, "Contracts on Equipment" to mean conditional sales contracts?

Mr. Blackstone: Your Honor, that is argumentative.

The Court: Well, what is your purpose? The tone of the question was argumentative.

The Witness: No, I don't.

Q. (By Mr. Sharff): I am sorry, your Honor. I didn't mean it to be that way. Well, Mr. Reilly, tell me this: You received this financial statement August 23rd, 1947. It says: "Contracts on Equipment, \$76,265," is that correct? A. Right.

Q. Did you make any inquiry as to the nature of the equities of Mr. Watson in any of his equipment? A. I did not.

Q. You did not?

The Court: What is the number of that exhibit?

Mr. Sharff: C, your Honor, Defendant's C.

The Witness: The only thing that I [136] checked—

Q. (By Mr. Sharff): Well, there is no question before you, please, Mr. Reilly.

Did you make any inquiries of Mr. Watson as to any mortgages on his equipment?

A. Yes. I asked Mr. Watson who owned the equipment besides himself. And he told me Mr. Halton had an interest in it.

Q. Mr. Halton had an interest in it?

(Testimony of Francis J. Reilly.)

A. Yes, sir.

Q. Did you ask him the nature of that interest?

A. No, I did not.

Q. Can you tell me when this conversation took place?

A. It was before the equipment was taken in Mr. Halton's yard when I was trying to check the warrants that I had on Mr. Watson.

Q. In other words, as I understand you, in your conversations with Mr. Watson before he took the equipment to the yard of Halton—and that would also be before you saw Mr. Halton, wouldn't it?

A. Yes.

Q. ——he told you Mr. Halton had an interest in the equipment, is that correct, sir?

A. He told me he was buying the equipment from Mr. Halton.

Q. He told you he was buying it from Mr. Halton? A. That is right.

Q. Well, you said you went back and searched the Recorder's [137] records. Can you tell us when you did that, sir, approximately?

A. Let's see; it was about September—August, September. It must have been some time in August because I would have to file my—ask for a request, the lien to be filed, and the lien was filed from San Francisco. So it evidently was in August.

Q. That would be the second time you checked the County Recorder's records in August?

A. Right.

Q. Did you ever check them thereafter?

(Testimony of Francis J. Reilly.)

A. Check the County Recorder's office?

Q. Yes. A. Yes.

Q. In respect to Mr. Watson? A. Yes.

Q. Approximately when did you make the third search of the County Recorder's records?

A. When Mr. Halton told me that he had recorded the mortgage and I went to search the County records.

Q. And over what period of time did you search the records on that occasion?

A. Oh, I don't know.

Q. You don't know. Did you search for the year 1947?

A. Yes. I think it was back further than that, '45, '46, [138] and '47.

Q. And then you missed the Morris Plan mortgage?

A. I missed the Morris Plan mortgage, yes, sir.

Q. Did you ask Mr. Halton for a copy of his mortgage when he told you he had one?

A. Mr. Halton never told me until after the mortgage was filed that he had one. No, sir, I did not ask him for a copy.

Q. You didn't ask him for any documents he had, did you? A. No, sir; no, sir.

Q. Did you ever ask him if he had any other interests other than the mortgage? A. No, sir.

Q. Mr. Reilly, I want to be fair to you. Have you ever inspected the equipment covered by that Morris Plan mortgage? A. No, sir.

Q. You never have. Did you make a list of the

(Testimony of Francis J. Reilly.)
equipment covered by the mortgages given by Lloyd
Watson that you saw in the County Recorder's
office? A. Did I make a list?

Q. Yes.

A. There was no occasion to make a list.

Q. Why wasn't there, sir?

A. Because Mr.—before I had a chance to make
a list or do anything, Mr. Halton told me that he
would take care of the [139] taxes. And as long as
he was taking care of the taxes, there was no sense
in me making a list of the equipment.

Q. I see. Well, what I am asking you is this:
You misunderstand my question. When you checked
the County Recorder's office the first time—

A. Uh-huh.

Q. —didn't you check the items and the mort-
gages to ascertain what assets Mr. Watson had?

A. That is all I did. I went to the big book there
where they have "U. S. Government v. So-and-So"
in there and I go down that list to find out who
has a lien against who, to find out if the govern-
ment has any liens filed against Watson; or then I
checked back into the other books to see if Watson
owed for any other mortgages.

Q. And then you did see that there was mort-
gages from Watson? A. Yes, but—

Q. Did you go and read the copies of them in
the County Recorder's office?

A. No, sir, I did not.

Q. Oh. Let's get this definite. You did not in-
spect copies of any of the mortgages given by Lloyd

(Testimony of Francis J. Reilly.)

Watson as filed with the County Recorder's office in Merced?

A. That is right; I did not inspect any of them.

The Court: You just ran the indices? [140]

A. No, sir.

Q. (By Mr. Sharff): Mr. Reilly, I want to ask you again, when Mr. Watson made a statement to you that he was buying the equipment from Halton, did it suggest a conditional sales contract to you in your work? A. No, sir, it did not.

Q. It did not? A. No.

Q. What does this suggest to you, sir? A man says he is buying equipment?

A. That he is paying so much down and so much a month on the equipment. I went to the courthouse to check and I could find no chattel mortgage recorded against Lloyd Watson by Mr. Halton.

Q. You know about conditional sales contracts, I believe, from your work, don't you?

A. I handle very few of them.

Q. Well, you run into them, don't you, in your work? A. Now, yes.

Q. Oh, you didn't then; is that what you are telling me? A. That's right.

Q. At that time you were unfamiliar with the conditional sales contracts; is that what you are telling us? A. That's right.

Q. Well, Mr. Reilly, you went and saw this mortgage of Mr. [141] Halton's on file for only \$28,000, didn't you? A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. And you had in your possession and before you this statement, contracts payable, \$76,000?

A. Yes.

Q. Did you make any inquiry as to where or what other encumbrances there might be on this property of Mr. Watson?

Mr. Blackstone: It has been asked and answered.

The Witness: No, I did not.

Q. (By Mr. Sharff): You did not?

A. I did not.

Q. How did you happen to go to see Mr. Halton?

A. When Mr. Watson phoned me and told me that the machinery was being moved to Mr. Halton's yard, then I went to see Mr. Halton.

Q. What was your purpose in going to see Mr. Halton?

A. To tell Mr. Halton that he had tax liens filed against Mr. Watson. And Mr. Watson told me he had a certain equity in that machinery. Therefore, the tax liens covered that equity that Mr. Watson had of the machinery for taxes.

Q. You went there for the purpose of getting Mr. Halton to pay the taxes, didn't you?

A. I did not go there for the purpose of getting Mr. Halton to pay the taxes.

Q. Did you ask Mr. Halton how much money was due him against [142] this equipment?

A. I did not.

Q. Did you concern yourself with that?

A. No, sir. That would have come later at that time if we had had to sell the equipment. I would

(Testimony of Francis J. Reilly.)

have had to take an inventory to find out what his encumbrances were against the equipment.

Q. As I understood your testimony, Mr. Halton did not in your first conversation say or suggest that he would pay the taxes due from Mr. Watson, did he? A. No, he did not.

Q. He did not on the first day?

A. No, he didn't.

Q. And on the first day did you tell him that the alternative to him paying the tax was that the government would take this property and sell it?

A. I said the government had a right to sell Watson's equity in the property if it covered the taxes.

Q. Did you on any occasion tell him that the alternative to paying the taxes from the Halton Tractor Company was that the property would be seized and sold?

A. Wait a minute. Rephrase that question, please.

Mr. Sharff: Will you read it back? If you don't understand it—

The Witness: I did not. [143]

(Question read.)

The Witness: I did not.

Q. (By Mr. Sharff): You never did?

A. I was not interested in the Halton Tractor Company. I was only interested in Lloyd Watson paying the taxes.

Q. Mr. Reilly, under oath you gave a report to

(Testimony of Francis J. Reilly.)

Mr. Valde, to Mr. Walter Valde; is that correct, sir? A. Right.

Q. In regard to this matter—do you wish to inspect it?

A. I do. There is nothing—the only thing I stated in here was that the government would take restraint action against the property over here being held by Mr.—because my liens were filed at the time that Mr.—what do you call it—Mr. Watson held the property.

Q. I asked you a few minutes ago, Mr. Reilly, if you hadn't told Mr. Halton that the alternative to Halton Tractor Company paying the taxes was that the government would seize and sell the property. A. I did not.

Q. You did not? A. No.

Q. I read you from this report to Robert Valde, dated October 14th, 1953, "Because of conversations with him"—referring to Mr. Halton—"he"—Mr. Halton—"realized that were I to seize and sell the property owned by Lloyd Watson [144] under existing liens that quite possibly he"—the plaintiff—"would never have had no funds made available to him to satisfy his claim."

A. That's right.

Q. Does that refresh your recollection?

A. Yes. But that's not telling Mr. Halton that—make a demand on him for the payment of it or I would sell it, the property.

Q. I asked you, sir, didn't you tell Mr. Halton that the alternative to Halton Tractor Company

(Testimony of Francis J. Reilly.)

paying the taxes was that the government would seize his property and sell it?

A. I didn't tell Mr. Halton the alternative was—I said that if the taxes were not paid—I didn't say by Mr. Halton—I said if the taxes were not paid that the government could seize the property and sell it.

Q. That is what you told him?

A. That is what I told him.

Q. And you didn't use the word "equity" either when you told him that, did you?

A. Probably not.

Q. Probably not. And is this statement contained in your report correct, Mr.—

A. As far as I know, yes.

Q. Yes.

Mr. Blackstone: What is the date of that? [145]

Mr. Sharff: April 14th, 1953.

Mr. Blackstone: What paragraph are you reading from?

Q. (By Mr. Sharff): Paragraph 8. I don't know why, it coincides with my birthday.

Mr. Reilly, other than the yellow piece of paper received in evidence here as Plaintiff's No. 4, did you serve any other paper such as a warrant of restraint, notice to withhold, or notice of levy upon Halton or the Halton Tractor Company?

A. No, sir, I did not.

Q. And I presume your answer would be the same in regard to Wes Durston, Inc., wouldn't it?

A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. All right. Mr. Reilly, please search your memory on this point. Didn't Mr. Halton at some time during these conversations ask you if he didn't have some remedy or way to get the money back that he paid to the government?

A. I don't recall if he did.

Q. It could be that he did, though, couldn't it?

A. No. I think I would recall it. I have been searching my memory for a long time on this case.

Q. And you are quite certain as you sit there that Mr. Halton at no time asked you what relief he had to recover back that money?

A. No, sir, I don't recall it.

Q. You have known Mr. Halton for a long [146] time? A. Long time, yes, sir.

Q. And you regard one another as neighbors, don't you? A. Yes.

Q. And Mr. Halton regarded you in that nature, didn't he? A. I presume so.

Q. And Mr. Halton's reputation in the community where you reside is for truth, honesty and integrity, isn't it? A. Very high.

Q. And in telling him you had that in mind, didn't you? A. Right.

Q. Mr. Reilly, prior to the trip to Los Banos, did Mr. Halton make any suggestion in regard to selling this equipment to him or repairing it and selling it? A. I don't think so, no, sir.

Q. You don't think—

A. It was afterwards.

Q. It was afterwards? A. Yes, sir.

(Testimony of Francis J. Reilly.)

Q. I call your attention also to this report, sir—suppose you read paragraph 7 also, Mr. Reilly; it has some questions about that.

The Court: Well, while he is reading it, Mr. Sharff, how much longer is cross-examination going to take?

Mr. Sharff: Not over five minutes, your Honor. I am sorry, your Honor, but I thought we wanted to accommodate the [147] witness.

The Court: Yes, I do want to accommodate the witness, but I also don't want you to cut off cross-examination that is important.

Mr. Sharff: Yes, sir.

The Court: But I am not going to extend this thing over any undue length of time. If necessary, we'll just have to keep the matter here until tomorrow.

Mr. Sharff I can assure your Honor I don't like working past 4:30 in the courtroom.

The Court: It's not only that: There are other things that have to be done as you well know and I want to get this matter disposed of if I can. But the main thing I want you to know if necessary I will hold Mr. Reilly here until tomorrow.

Q. (By Mr. Sharff): Well, I don't want to discommode him. Mr. Reilly, isn't it the fact that in your report—if I can hasten this up—you said that Halton proposed to you that if he be allowed to repair it and sell it prior to the time you went to Los Banos—

A. No, sir; I don't see it in this report here.

(Testimony of Francis J. Reilly.)

Q. It isn't?

Seven reads—

A. That's right. "Plaintiff proposed to me that if he were permitted to move the equipment to his own property and [148] repair it and later sell it, he would contact me to pay the tax owed by Lloyd Watson in full."

Q. And then in paragraph 8 you say: "After the equipment was moved to the premises"—that is, of the plaintiff—"I posted notices on each piece of equipment." Doesn't that refer to a later date or do you understand your letter—

A. You misunderstand my letter.

Q. I am sorry if I do. You didn't mean to say it was at a later date; is that what you are telling us? A. Yes, sir.

Q. Tell me, Mr. Reilly, when property is in the possession of a third party, don't you usually serve documents such as a warrant of restraint or notice to withhold on them?

A. No, sir. The warrant of restraint is issued against the person owing the taxes. Then if we should have to sell, we notify the person holding any mortgages or any other equity in it. But first we must take an inventory of the property. Then after taking the inventory of the property and finding that out, if we don't think that we can get enough out of it to pay off that mortgage, if that mortgage was prior to our lien, we would not even touch it.

Q. You haven't answered my question.

(Testimony of Francis J. Reilly.)

A. Well, I tried to.

Mr. Sharff: I asked you. I asked the answer go out as not responsive. [149]

The Court: I won't strike the answer, but you can reask the question.

Q. (By Mr. Sharff): Don't you receive some paper or document on the third party in possession of the property of the taxpayer? Isn't that the usual course of procedure?

A. Oh, serve a levy, yes, sir.

Q. You serve a levy?

A. That's right, sir.

Q. And is it notice of levy?

A. A notice of levy.

Q. And did you serve that on Mr. Halton?

A. I did not.

Q. You did not? A. No, sir.

Q. Do you have a copy of that form with you, sir? A. No, sir, I don't.

Mr. Sharff: Could it be supplied to counsel?

Mr. Blackstone: Oh, yes, of course, we can supply a notice of levy. I can't see what is the purpose of that. I mean, you want to examine it?

Mr. Sharff: That's right, sir. We would like to show that the letter was mailed him promptly. It's very simple, believe me.

Q. Mr. Reilly, you stated that Mr. Watson—Mr. Halton made a proposition that he be allowed to repair the equipment and [150] sell it, and then the taxes be paid. In that conversation, was anything said as to who would get the first—well, we'll

(Testimony of Francis J. Reilly.)

use the slang term, "sellers take" out of the proceeds? A. No, I don't think there was.

Q. You didn't get that far?

A. We didn't get that far.

Q. Mr. Halton did tell you that if the property were sold in its present condition that it would bring a fraction of its value, didn't he?

A. That's right; yes, sir.

Q. Well, can you tell us how it happened that you did not find the Morris Plan mortgage in your search of the indices of the Court?

A. No, I can't tell you.

Q. That is, of the County Recorder.

A. I must have overlooked it, if it was there.

Mr. Sharff: I think that is all.

Mr. Blackstone: I just have two questions, or three.

The Court: Yes.

Redirect Examination

By Mr. Blackstone:

Q. Can you explain your understanding of the procedures of collection work of the Internal Revenue Service? Insofar as serving a notice of levy is concerned, on third persons other than the taxpayer, Mr. Reilly? [151]

A. Yes, sir. If we have a warrant on an individual who owes taxes, that warrant is issued by the Department. We find out if that individual—we go to him first and give him the notice of the war-

(Testimony of Francis J. Reilly.)

rant and ask for payment. If he cannot pay it and we find out he has any property or salary or wages coming to him, we go and make out the levy which we have in our office, which is already signed by the Director of Internal Revenue. And we serve that on the party that either holds any interest that this taxpayer has demanding payment from that third party of any interest that the taxpayer would have with the third party such as salaries, wages, or equipment or anything else, that they would be holding.

Q. Can you explain why you did not give a notice of levy to Mr. Halton in this case?

A. That's right. Mr. Halton is a respectable businessman and when he said he would pay the taxes I saw no reason to give him a levy.

Q. I should like also to ask you, Mr. Reilly, if you could perhaps—the point that was brought out on cross-examination, this letter of April 14th, 1953, where was it your understanding this property was to be taken for repair purposes? Was that at Los Banos?

A. No, sir; Merced. It was to be taken to Merced, as I understood it.

Q. So when you stated, "The plaintiff proposed to me that [152] if he were permitted to move the equipment to Los Banos and repair it," were you referring to the movement from Los Banos to Merced?

A. Los Banos to Merced, yes, sir.

Mr. Blackstone: I see. I think that is all.

(Testimony of Francis J. Reilly.)

Recross-Examination

By Mr. Sharff:

Q. Mr. Reilly, I don't want to be argumentative—and I say that to the Court—but the fact that Mr. Halton is a respectable and honorable businessman, did you understand that under the law that that relieved you of following the normal legal proceedings to levy upon property in the possession of a third party?

A. Yes. If somebody promises to pay me, I don't go and levy on them.

Q. All right. But when did Mr. Halton—withdraw that.

It was on the occasion of your third visit to Mr. Halton that he—and after your telephone call to San Francisco, wasn't it—that then Mr. Halton for the first time said he would pay the taxes, isn't that right?

A. Mr. Halton told me that he would sell—if he was allowed to take the machinery from Los Banos to Merced and overhaul it and sell the machinery—

Q. Yes?

A. That he would pay the taxes that Lloyd Watson owed.

Q. After he sold it? [153]

A. No. I told him that he would have to pay the taxes before he sold it.

Q. Well, the Court questioned you on this very

(Testimony of Francis J. Reilly.)

same point, Mr. Reilly. Probably I am confusing you or probably one of us is confused. I understood you to say that Mr.—and correct me if I am wrong—or the rest of us are wrong—that Mr. Halton's proposition was that he be allowed to repair the equipment and sell it and then pay the taxes from the proceeds.

A. That was his first proposition.

Q. Yes. And what did you say to him right then, right there?

A. I told him that I couldn't do that because I would have to have the taxes first.

Q. You told him that right then?

A. Right then. But I said I would also have to get permission from the San Francisco office to do anything.

Q. You mean you would have to get permission from the San Francisco office to accept the money?

A. No.

Q. Well, what then, please? Explain it to us.

A. To allow him to move the machinery and fix it up from Los Banos to the Merced yard.

Q. Well, I am sorry; I am rather dense, I guess. If Mr. Reilly—if Mr. Halton paid the taxes, what was there preventing him from moving it to Los Banos or to Merced or from [154] Timbuctoo, not to be sarcastic?

A. But he didn't pay me the taxes. If Mr. Halton sat down and wrote out a check for the full amount which he didn't even know what it was

(Testimony of Francis J. Reilly.)

because I hadn't set up all the records as yet, everything would have been over with.

Q. Then isn't it the fact that you phoned San Francisco to see if it was permissible for Mr. Halton to move the equipment from Los Banos to Merced and repair it and sell it before the taxes were paid; isn't that what you phoned San Francisco for?

A. No, sir.

Mr. Sharff: That is all.

The Court: Any further questions?

All right. Mr. Reilly, step down.

Now, gentlemen, that concludes the testimony so far. We will have to go forward at 10:00 o'clock in the morning. About how many witnesses do you have?

Mr. Sharff: I only have the one witness, Mr. Halton's bookkeeper, your Honor. And the question of how lengthy his testimony will be will be a question of how much foundation Mr. Blackstone wishes me to lay for his testimony for the exhibits I have to offer and how much his cross-examination will be of Mr. Bostick.

The Court: Mr. Blackstone, do you have any other witnesses? [155]

Mr. Blackstone: No. I have the certificate of assessment and payments, just to plead the case and some of the documents, but no witnesses.

Mr. Sharff: Just a second. One of my clients wants to speak to me before I release Mr. Reilly.

The Court: Yes. Well, we will be at recess until 10:00 o'clock tomorrow morning.

Those notices, the assessments——

Mr. Blackstone: Notice of levy.

The Court: Notice of levy that you have—now, I am not talking about the form. You say you have some documents here?

Mr. Blackstone: Well, it's a certificate of assessments and payments to show the taxes were in fact assessed against Mr. Watson and the payments.

The Court: I think you will stipulate to that.

Mr. Sharff: Stipulate to that, your Honor.

Mr. Blackstone: Well, all right. That, of course, is a necessary element in our defense, that the taxes were lawfully assessed and nothing——

Mr. Sharff: We will stipulate the taxes were due, your Honor. But we don't believe that Mr. Halton wanted to donate this much money to the government.

The Court: That is the very reason we are here. I am not asking you to stipulate to that. All I want to know, so the record is complete on the [156] matter——

Mr. Blackstone: I want to be clear——

The Court: Well, yes, of course, Mr. Blackstone, you are entitled to that.

We will be at recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to tomorrow, March 10, 1955, at 10:00 o'clock a.m.) [157]

March 10, 1955, 10:00 A.M.

The Clerk: Halton Tractor, Durston, Inc., against the United States for further trial.

Mr. Sharff: Ready.

Mr. Blackstone: Ready, your Honor.

The Court: All right. Call your next witness.

Mr. Sharff: Yes, your Honor.

Before putting the next witness on the stand, it occurred to me this morning that it might not appear from the evidence as it stands at this stage, and possibly a stipulation could cover it, why, during the period of 1947 when C.I.T. Corporation held this conditional sales contract Mr. Durston was pressing Mr. Watson for payment of the tractors. Does your Honor follow—

The Court: No; I don't.

Mr. Sharff: Mr. Durston testified yesterday that in the summer and fall of 1947 he contacted Mr. Watson on numerous—several occasions and asked him whether he would bring the payments up to date. And during that time—

The Court: You mean that is on the contracts?

Mr. Sharff: Yes. During that time, however, your Honor, it appears from the evidence that C.I.T. Corporation was actually the owner of the contract.

Now, Mr. Durston would testify that C.I.T. Corporation [158] was calling him and pressing him and he in turn therefore was pressing Mr. Watson.

The Court: Well, do you need testimony on that?

Well. I mean, isn't it standard form?

Mr. Sharff: Standard form of procedure; yes, your Honor. But I thought it might be considered some gap in the evidence. Therefore, I wanted to clear it up. Will you stipulate that was the fact, that Mr. Durston was being pressed by the C.I.T. Corporation and that was the reason in turn he pressed Mr. Watson as he testified?

Mr. Blackstone: He was being pressed on his guarantee?

Mr. Sharff: Yes.

Mr. Blackstone: Well, I will stipulate to that. I assume he would so testify.

Mr. Sharff: Yes; he would.

The Court: All right.

Mr. Sharff: I thought there might be a gap in the evidence, your Honor.

Mr. Bostick, will you take the stand, please?

FRANK BOSTICK

called as a witness on behalf of the plaintiff; sworn.

The Clerk: State your full name for the Court and record.

A. Frank E. Bostick.

Q. Spell your last name. [159]

A. B-o-s-t-i-c-k.

Direct Examination

By Mr. Sharff:

Q. Where do you reside, Mr. Bostick?

A. Merced, California.

Q. What is your business or occupation?

(Testimony of Frank Bostick.)

A. I am office manager for Halton Tractor Company.

Q. What is your usual occupation, sir?

A. An accountant.

Q. And how many years have you been an accountant? A. Since 1942.

Q. Now, how long have you been employed by Halton Tractor Company in the capacity of office manager? A. Since February, 1949.

Q. In the course of your duties, are the records of the Halton Tractor Company, a corporation, under your direction and control?

A. They are.

Q. Now, have you brought a number of those records to the courtroom here with you?

A. Yes; I have.

Q. And do they relate to the transactions between Halton Tractor Company and Mr. Lloyd Watson? A. They do.

Q. Do they cover the years of 1947 and '48?

A. Yes; they do. [160]

Q. All right. Now, do you have any record which shows, or from which you can tell us the amount that was due under the conditional sales contract, heretofore received in evidence as Plaintiff's No. 1, as of the date of January 31st, 1948?

A. I have actually two records. I have a memo, which I have taken from the original records, plus the original inventory cards, which with the allocations were made from the monies accredited to Mr. Watson.

(Testimony of Frank Bostick.)

Q. Monies credited or money due from him?

A. Due from him.

Q. Yes. Do you have those inventory cards with you? A. Yes; I do.

Q. How many are they in number, sir?

A. Well, they are approximately 12.

Q. Approximately 12?

A. That covers that—14, sir.

Q. 14. Well, now, Mr. Bostick, will you tell us what pieces of equipment they cover—or rather, probably we can expedite this. I show you a statement, Mr. Bostick, and I ask you if you prepared this. A. Yes; I did.

Q. And did you prepare it from the records of Halton Tractor Company under your possession and control? A. I did.

Mr. Sharff: I ask it be marked for identification at [161] this time. I will hand you another copy for your use, Mr. Bostick.

The Court: Plaintiff's 10 for identification.

(Whereupon, summary of inventory items was marked Plaintiff's Exhibit No. 10 for identification.)

Q. (By Mr. Sharff): Would you tell us, Mr. Bostick, if the inventory cards you have here cover all of the items found on Plaintiff's No. 10 for identification? A. They do.

Q. Do they cover the Ford pickup and the Chevrolet coupe? A. They do.

Q. All right. Now, the inventory cards, what do

(Testimony of Frank Bostick.)

they cover in the way of records of the Halton Tractor Company, or what do they show?

A. They cover the initial costs plus the amount of repair work done on the equipment.

Mr. Sharff: Your Honor, I think it might be helpful for the court in following the testimony if your Honor took one of these exhibits.

The Court: Yes.

Q. (By Mr. Sharff): Now, let us go first to the matter of column No. 4, which you have headed, "Initial Cost," and which you have a total of \$48,496.10. Will you tell us how you arrived at that total, sir?

A. Yes. These totals are comprised of the balance due [162] under the conditional sales contract plus interest, the balance due on the mortgage plus interest, the amount of the checks paid to the United States government, one in the amount of 2,200 and the other in the amount of \$7,777.97.

Q. From what source did you take the figures of the initial cost, Mr. Bostick?

A. They were taken from two sources. The first was a general entry in our books in which we made an entry crediting Mr. Watson and charging our inventory for the amount due under the mortgage and the conditional sales contract, principal and interest.

The second item was from the checks which were charged directly to our asset account and used equipment.

Q. Is the information also found in columns—

(Testimony of Frank Bostick.)

rather, set forth in column 4 under "Initial cost" also shown on the inventory cards which you have in your possession here in court?

A. Yes; they are.

Q. Can you tell us from these records what was the amount due on the conditional sales contract as of January 31st, 1948?

A. May I refer to my notes?

The Court: Certainly.

The Witness: The conditional sales contract balance due January 31st, 1948, principal [163] \$14,594.06.

Q. (By Mr. Sharff): What was the balance due under the Morris Plan chattel mortgage?

A. \$23,000 even.

Q. And you added interest to that, did you?

A. Interest accrued to date on both instruments. The interest due on the conditional sales contract at that date was \$351.78, interest due on the instrument secured by the mortgage \$562.27.

Q. Now, let's understand that. The total of \$48,496 under Initial Cost is then the total of the balance due on the chattel mortgage with interest, the balance due on the conditional sales with interest, plus the money paid to the United States Government; is that correct? A. That is correct.

The Court: May I ask this question, then: When you say the chattel mortgage, which chattel mortgage are you talking about?

A. That is the Morris Plan chattel mortgage, your Honor.

(Testimony of Frank Bostick.)

Q. All right. That is the one that is Exhibit No.—let's see what number that is.

A. I am sorry. It's the second one.

Q. Is the chattel mortgage of October, 1947?

Mr. Sharff: Yes.

The Court: All right.

Q. (By Mr. Sharff): Now, that information all appears on [164] the inventory cards; is that correct? A. Yes; it does.

Q. All right. Now, let's go on.

The Court: I want to ask another question.

Mr. Sharff: Certainly, your Honor.

The Court: In this column under Initial Costs, I see no entries for the amounts pledged to the government.

The Witness: I might explain to your Honor that the way we did this, we credited or used the inventory account, which is a control account, for the entire amount of the credit allowed Watson plus the checks, and then reallocated the amounts.

Q. Well, the initial cost is based upon a reallocation? A. That is correct.

The Court: All right.

Q. (By Mr. Sharff): Tell me this. The first column you have here is "Dated Received," and I see 1/31/48. Can you explain—does that entry come from the inventory cards? A. Yes; it does.

Q. In other words, the inventory cards show this equipment all received as 1/31/48? A. Yes.

Q. And the "Description" in the next column is taken from the inventory cards?

(Testimony of Frank Bostick.)

A. Yes. [165]

Q. All right. Now, we go to the next column, "Repairs in Halton Shop," and we have certain items there under that column. Will you tell us from what source or sources that information was obtained, and are the original records thereof in the courtroom?

A. The source of this—these amounts are from original job cards covering the cost of the work performed in reconditioning this equipment. I have a portion of the original document in the courtroom today. The portions covering the work done in Merced were destroyed about three years ago due to a space limitation of our storage facilities. Unfortunately, I never realized that I would ever need them. But I do have the records from Los Banos.

Q. Are we to understand that you are testifying that the records of the Halton Tractor Company, part of its repair work, was done at Los Banos and part of it at Merced? A. That is correct.

Mr. Blackstone: Is that based on personal knowledge?

Q. (By Mr. Sharff): Well, what Mr. Blackstone wants to know is on what you base that.

A. I don't quite understand your question. Do you mean whether it was done at Merced?

Mr. Blackstone: I mean, if you see it done. That is what I was concerned with.

A. I wasn't concerned with it at that time. However, our [166] records are identified as to location of the work done.

(Testimony of Frank Bostick.)

Q. I see. You are basing that on the records?

A. Yes; that is correct.

Q. (By Mr. Sharff): Now, you have here, I believe, in court, the records of the work at Los Banos; is that correct?

A. That is correct. These are the original records of the work performed.

Q. All right. Now, in those cases where the work was done at Merced, from where have you taken the figures which you have put under the column, "Repairs"?

A. They were taken from an internal journal to which these documents are posted in the normal course of operations.

Q. I see. Well, now, the column, "Total cost of sales," that is a total, is it, of initial costs plus repairs? A. That is correct.

Q. Now, then, you have "Sold for," and to whom it was sold and the date. From what records did you obtain that information?

A. From the ledger cards; also, the information as set out in the inventory cards.

Q. The inventory cards are here in court; is that right? A. They are.

Q. Now, in other words, as we read here then, these were sold for \$57,000, the total of this equipment was sold for \$57,807.97; is that correct? [167]

A. Correct.

Q. All right. Now, you have an item here at the bottom, "Sales Department Operating Expenses."

(Testimony of Frank Bostick.)

\$7,931.25. From what source did you obtain that information?

A. I obtained that information from our annual financial and cost analysis by taking the total operating sales department expense and arriving at a percentage covering the total sales for the year, and applying that percentage to the gross amount of the sales, this figure, \$57,807.97.

Q. Now, is the original record from which you took your total cost of sales and the amount of sales here in court? A. Yes; it is.

Q. It is? A. I have that here.

Q. All right. Now then, "B" is the item of the taxes which were paid to you by Durston; isn't that correct? A. That is correct.

Q. Yes. And stating the initial costs shown in column 4, sir, you did not put it in the \$3,900?

A. No; I did not. It was received after the original transaction had taken place.

Q. I see. Now, you have under "C" here, "Potential profit on basis of sales of used equipment"; what do you mean by that, sir?

A. Working back in the statement for the year, 1948, I took [168] the gross sales of used equipment less the cost of sales of used equipment, and arrived at a percentage of gross profit. From the gross profit percentage—or excuse me, from the total sales of used equipment, I deducted out the transactions covering the Watson equipment to arrive at the next transactions exclusive of the Watson equipment, and arrived then at a gross profit figure.

(Testimony of Frank Bostick.)

Q. You mean a gross profit percentage?

A. Gross profit percentage.

Q. Will you tell us what that gross profit percentage was?

A. Yes. That gross profit percentage was 16.52 per cent. From that I deducted the percentage which was developed in allocating the sales department operating expense to arrive at the net profit percentage on operations of 1948 in the sales of used equipment, and arrived at a 2.80 per cent net profit.

Q. In other words, you have used here a profit figure of 2 point what, sir? A. 2.8.

Q. On a dollar's worth of sales, is that correct, on used equipment? A. Yes.

Q. And that is the figure which reaches \$1,618.62, is that correct?

A. Yes. The 2.8 per cent was applied to the \$57,807.97 to [169] arrive at the figure of \$1,618.62.

Q. Right. Now, those figures, I believe, were taken from the original records which you have here in court, is that correct? A. Yes.

Q. All right. Now, the next item, "D," is "Interest accruing under conditional sales agreement and mortgage"? A. That is correct.

Q. Did you figure that under the October mortgage or the Morris Plan mortgage?

A. I believe it was the Morris Plan mortgage; Morris Plan mortgage, yes; plus the conditional sales contract.

(Testimony of Frank Bostick.)

Q. And to what date did you figure that, sir?

A. I applied that to the balance of the equipment as it was held in inventory until the period it was sold. In other words, it's an allocated figure. I have the schedule here for exhibit.

Q. You have?

A. It's quite a computation. It's a little bit difficult to explain.

Q. In other words, what it amounts to is interest in each piece of this equipment until it was sold on the date shown in the last column; is that correct?

A. That is correct.

Q. Now, the last item here is "E," "Difference between [170] actual overhead and base rate charged (shop overhead only)"?

A. That is correct.

Q. Now, what does that refer to, Mr. Bostick?

A. In the year, 1948, we used and applied overhead rate of \$1.15 an hour. Rather than compute our overhead rate for the shop monthly, which would be very difficult, we make an estimate of the original the first part of the year, ordinarily, based on the last year's operations, and establish what we feel to be an equitable rate. We use that as our applied overhead all year.

At the end of the year when we draw off our final financial and cost statements, we develop the actual overhead. The actual overhead in this case was \$1.33 an hour rather than \$1.15. The amount of \$276.89 represents the difference applied to the total number of hours of work done in repairs, which is

(Testimony of Frank Bostick.)

column 5, I believe. In other words, the cost as set out in the repairs in the Halton shop, an overhead rate of \$1.15 was charged, where the actual incurred overhead was \$1.33. This \$276 makes up the difference.

Q. Now, then, your total cost and expenses counting in a potential profit of 2 point some per cent was the amount of \$62,875.50; is that correct?

A. That is correct.

Q. And which leaves a loss to Halton Tractor Company of how much, sir? [171]

Mr. Blackstone: I object. I object to that question. There can't be a loss if you are bringing in profit.

Mr. Sharff: Well, I mean uncovered cost and revenue loss.

Mr. Blackstone: I think right now I can move to strike from this exhibit this item "C" here, potential profit. We are only talking about, as I understood it, costs here. Adding a potential profit as an item of expense completely mystifies me under my legal theory.

Mr. Sharff: Well, your Honor, it doesn't me. If a liquidator, an auctioneer, has handled the disposal of this equipment, he would have charged a fee for doing it. But I believe under the prevailing rate, it would have been five to ten per cent, sometimes as high as 25 per cent.

Now, Mr. Halton went into this transaction hoping to make a profit from Mr. Watson in selling him new equipment. This was thwarted by the acts of the Government here. Certainly he is entitled to

(Testimony of Frank Bostick.)

recover the normal rate of profit if for no reason else than this, your Honor: that Mr. Halton could certainly have sold other used equipment and for which he would have had a normal rate of equipment—normal rate of profit—to the same customers.

The Court: I don't—I mean I don't so understand it. Actually all he was doing, anyway, was selling the property, and if he could make a profit for Watson, he would have. [172]

The fact that the taxes are involved, the Government is just standing in Watson's shoes in that respect. Now, if he couldn't have charged this item against Watson, he can't charge it against the Government.

Mr. Sharff: Well, he certainly would have made a profit in the transaction, contemplated a profit, your Honor. Certainly Mr. Halton is not to be asked to do all this work for nothing, your Honor. He is not in business for his health. It seems to me that he should be—

The Court: You mean when he made a bum business deal in the first place he is supposed to make a profit on it?

Mr. Sharff: It wasn't a bum business deal in the beginning, your Honor.

The Court: Well, I am not saying he is a bad business man. But it turned out to be a transaction in which it was necessary to make a repossession, and he had to go through what, if I may use for want of a better term, a salvage operation.

Mr. Sharff: That is just the point. Your Honor

(Testimony of Frank Bostick.)

has hit it right on the head. This did not start out to be a salvage operation. Mr. Halton took it on the basis of selling it to establish a credit on the books for sale of new equipment; the Government stepped in and it became a salvage operation, as your Honor termed it.

The Court: Well, the basic point I am making is —no, [173] I don't think that is true. I don't think it changes the operation insofar as Mr. Halton is concerned from a salvage operation at all. It was a salvage operation in every instance. He was going to make as much as he could, and the question I want to know is: Do you contend that this item could have been charged against Watson?

Mr. Sharff: Not on the original agreement. But the original agreement was destroyed by the Government's actions.

The Court: Which original—are you talking about the—

Mr. Sharff: The December conversation with Mr. Watson, your Honor.

The Court: Well, I don't know whether I can agree with that. But I don't want to decide that until I come to the point. I am not going to rule immediately on the motion to strike, Mr. Blackstone, because I want to hear more about it.

Mr. Blackstone: Well, I wanted to make the objection.

The Court: Well, you certainly have a right to, and I want you to when you come to the cross-examination, develop the matter but as you think it

(Testimony of Frank Bostick.)

should be developed. But what I am principally interested in, and what Mr. Sharff is doing, is giving the basis for all of the charges.

Now, I gather here that the purpose of this testimony is to determine what if anything was left to Mr. Watson.

Mr. Sharff: That is correct, your Honor.

The Court: And your purpose was to show that there was [174] not?

Mr. Sharff: That is right, your Honor. That is exactly it. And I think, acting as a liquidator, he was entitled to a reasonable fee as a profit for his services, not just an operation for expenses. That's one of the theories under which I think the Court should consider the matter. If he is acting as a liquidator, he is entitled to the profit as a liquidator, the way the transaction came out.

Your Honor, I ask that Plaintiff's Exhibit No. 10 for identification now be received in evidence as Plaintiff's Exhibit No. 10.

The Court: Well, it will be admitted into evidence. But the validity of some of the items that are entered thereon will have to wait. That will have to be determined. The fact that it is in evidence is simply that it is a computation made by this witness based upon the records. I will admit it as such.

Mr. Sharff: You may cross-examine.

(Whereupon, the Plaintiff's Exhibit No. 10 formerly marked for identification was received in evidence.)

(Testimony of Frank Bostick.)

Cross-Examination

By Mr. Blackstone:

Q. Now, Mr. Bostick, this column on your Exhibit 10, "Initial Cost," you say that that information is taken from the inventory cards, these 14 cards that you [175] mentioned?

A. These 14 cards summarize it, the information.

Q. Well, I wondered—may I look at those inventory cards?

A. Certainly. The amount and the initial cost column there ordinarily will be the first figure on the card.

The Court: You made the allocation on the inventory card?

A. The inventory cards are a result of the calculation, your Honor.

Mr. Sharff: Does your Honor wish to inspect one?

The Court: No.

Mr. Blackstone: May I have this marked as an exhibit so it will be clear in the record?

The Clerk: Defendant's Exhibit E.

Mr. Sharff: That covers which tractor?

Mr. Blackstone: I will read it as soon as it is marked.

The Court: All right. Defendant's Exhibit next in order.

The Clerk: E.

The Court: Defendant's Exhibit E.

(Testimony of Frank Bostick.)

(Thereupon, the document referred to above was marked Defendant's Exhibit E for identification.)

Mr. Blackstone: I have had marked for identification an inventory card, Defendant's Exhibit E for identification. It relates to DW Tractor IN2581. Now, I don't think there [176] will be any objection if I also identified this tractor as being one that is covered by a mortgage of chattels dated October 2nd, 1947, which is Defendant's Exhibit A, isn't it?

The Court: I think it is.

Mr. Blackstone: Will there be any objection if I stand next to the witness here and go over the card with him?

The Court: No; of course not.

Mr. Blackstone: If you would like to come up, too, Mr. Sharff.

Mr. Sharff: I will be there in a moment, as soon as I—

Mr. Blackstone: All right.

Mr. Sharff: Go ahead, Mr. Blackstone, I am sorry.

Q. (By Mr. Blackstone): You have on this card under column entitled "Date received," 1/31/48. Now, is it your understanding that the card was made up at that time, on that date?

A. Excuse me. I wasn't with the firm at that time. However, being familiar with the procedure, I would state that it was my opinion that it was.

(Testimony of Frank Bostick.)

Q. And would that indicate the date that the company considered the equipment received at its plant?

A. Not necessarily. This is the date that the transaction crediting Watson's account and charging our asset account used inventory took place.

Q. In other words, the equipment would have been received by that date? [177]

A. That is right.

Q. This equipment had been sold or was subject to a chattel mortgage, was we stated, or as I stated before, and it is one of the items shown on Defendant's Exhibit A? Is there a prior card for this tractor?

A. Not that I am aware of. I don't see where there would be, actually.

Q. This is the first card, then, relating to that tractor?

A. As far as—let's see—now, originally I believe we sold this to Watson.

Q. Well, you don't know of your own knowledge, and you don't know, or you do know, that this is the only card relating to this tractor that is in the records? A. Affecting this transaction; yes.

Q. And the date received, does that refer to the date the tractor was received?

A. No; in this case the date refers to the date of the entry.

Q. There is a column that says "Purchased from" and it says, "Lloyd Watson." There is a

(Testimony of Frank Bostick.)

column then that says "Cost" and it has "February, \$9,000." Where did that item come from?

A. This February refers to this job, Mr. Blackstone.

Q. Underneath the entry "February" there appears "Job No. 3988." A. Right. [178]

Q. And an entry \$177.88.

A. Now, the \$9,000, where did that figure come to apply on this card? That came from the allocation of the initial cost transaction, as I understand.

Q. Taking the amount outstanding under this second chattel mortgage, Defendant's Exhibit A, and taking the amount outstanding under the conditional sales agreement, is that correct?

A. Plus interest accrued on both instruments, plus.

Q. So that date of January 31st, 1948, plus the two checks—

The Court: I want to know what you mean by both instruments.

A. The conditional sales contract and the mortgage, your Honor.

Q. Is it subject to conditional sales contract, too?

Mr. Blackstone: This tractor—no. He was telling how he arrived at this \$9,000 figure to apply on this one card.

The Court: Oh, he is allocating—

Mr. Blackstone: And he said he took the total amounts outstanding under these two instruments plus the amounts paid to the Government and—

The Witness: That is correct.

(Testimony of Frank Bostick.)

Q. (By Mr. Blackstone): Then how did you decide how much to allocate? Of course you did not do this? A. No; I didn't. [179]

Q. Do you know the form there that was used to decide that \$9,000 of this composite amount to be attributed to tractor DW-10 No. IN2581?

A. I am quite aware of the procedure used at that time. I might add, too, that that date was a retroactive date because, as we know, the two checks were written in February.

However, the transaction was made taking into account those checks, and entered in January on the last day of January. After the total amount had been determined, my predecessor, in all probability, was Mr. Halton and our sales manager, Mr. Brooks, took the information available and through their determination allocated the costs to these pieces of equipment on the basis of their knowledge of the condition and market for the particular pieces of equipment and their salability.

Q. It didn't then necessarily have any rational connection with the actual initial cost of this tractor, the amount that had been paid to the original seller of it, whoever that might have been?

Mr. Sharff: Just a moment.

A. I really couldn't answer that because you might have had a brand new piece of equipment that had been treated very hard and no repair work.

Q. (By Mr. Blackstone): Well, the most you could say was that it could or could not. But the

(Testimony of Frank Bostick.)

way your formula worked [180] out, you took a gross amount owing to the Halton Tractor plus the checks to the Government, and then tried to allocate it among the various items of equipment, I suppose —on the basis of which items?

A. Of estimated value at that time.

Q. Which items had been in better condition than others and which appeared to be of better value than others? A. That is correct.

Q. Then the next entry we have already identified under the cost column is Job No. 3988, \$177.88. What does that refer to?

A. That refers to—may I explain a little bit of the procedure, your Honor? It might clear a point here.

The Court: Yes.

The Witness: We post from this instrument—

Q. (By Mr. Blackstone): What instrument is that? A. That is a job card on which—

Q. For repairs?

A. That is correct, on which costs are accumulated, both labor, overhead and parts.

Q. Now, can you find job No. 3988 in there for me, please?

A. We have it right here. To go on with the procedure, the summary of this transaction—

Q. Would you wait just a minute? I would like to have this marked for identification, also.

The Court: All right, Defendant's Exhibit F for [181] identification.

(Testimony of Frank Bostick.)

(Whereupon, document referred to above was marked Defendant's Exhibit F for identification.)

Mr. Sharff: May I see it a moment, Mr. Clerk, please?

Q. (By Mr. Blackstone): Now, on Defendant's Exhibit F, I see two columns, one that has written in pencil "List" and under which are two entries, or several entries, "Labor, \$93.50; parts, \$106.41." "O period H."; what does that mean?

A. That is merely the abbreviation for overhead.

Q. And in that list column there is no entry for overhead then? A. No.

Q. And the total in the list column is \$199.91.

A. That is right.

Q. The next column is entitled "Net," and has "Labor, \$54.36; parts, \$79.82; overhead, \$43.70," and the total there is \$177.88.

A. That is right, referring to the—

Q. Referring to Defendant's Exhibit E. You then took, or the bookkeeper took the item under the net column, \$177.88, and placed it in this card. Would you explain what the difference is between the list entries and the net entries?

A. Primarily it's customers' rates; it lists the amounts that were charged for commercial work to customers. Net is our cost. [182]

Q. I see. And so you charged only costs?

A. That is correct.

Q. On these inventory cards? A. Yes.

Q. Looking at the actual breakdown of figures that come under the heading "Description," we find

(Testimony of Frank Bostick.)

the first entry January 26, "Description, changed tires; mechanic's number, 9." Does that identify the actual man who worked on the job?

A. Yes; it does.

Q. "Hours, 2." A. Yes.

Q. "List," it says, "\$5." A. Yes.

Q. Do I understand that that would be the charge you would make for labor to a customer?

A. That is correct.

Q. That would include profit, is that correct, then, to Halton Tractor?

A. Theoretically it should; we'll say it that way.

Q. It's more than what it actually cost you for labor?

A. I haven't analyzed for that particular year, so I really couldn't say.

Q. The net amount for these two hours' labor was \$3. Would that be the actual amount paid to the mechanic No. 9 for that job? [183]

A. It was apparently \$1.50 an hour; it would be his rate.

Q. Then may I ask, the particular description on this Defendant's Exhibit F of the work done simply is a labor cost, is that correct? It does not show parts?

A. That is correct. The parts are attached; the copies, parts, copies of the invoices are attached to the jobs.

Q. On the first page then is labor and the pink slips attached are the parts that were charged?

(Testimony of Frank Bostick.)

A. That's right. The summary of the entire transaction is set out here.

Q. Can you tell by looking at these pink slips whether the net price is shown thereon, or the list price, that would be the customer's charge for parts shown on the pink slips, or both? Would you refer to the first pink slip that you are looking at?

A. Yes. I am looking at a copy of invoice No. LB-66173, dated January 29th, 1948, for identification. It covers a large truck valve stem installed on a truck tube; labor is \$1.80 list, net is \$1.35. The identification of the account number up here indicates to me that it was done by an outside firm.

Q. And so that would be then included under the summary parts, is that it, and part of the—

A. Without adding them up—

Q. Even though— [184]

A. I would say.

Q. Even though the first sheet you referred to is entitled "Labor," that was not included in the description of labor shown on the first page?

A. That's correct.

Q. Looking at the second pink sheet, Mr. Bostick, could you state—

A. We have on the distribution across the page a column entitled "Quantity," a column entitled "Part Number," a column entitled "Description," a column entitled "Account Number," a column entitled "Price," a column entitled "Amount." The first item set out here is "Quantity, 1." The part number is "T259."

(Testimony of Frank Bostick.)

Q. May I interrupt just a minute. All I wanted to find out is if you could tell from looking at this particular page if a list price is shown, that is, a price that is to be charged to a customer?

A. That is a list price. Q. \$13.25?

A. Less 25 per cent, which is our account on these particular parts; these reduced here, giving a total of \$9.94 net.

Q. Does that reflect the actual cost to Halton Tractor, or is that just a general way of figuring out what cost would be, or what does the 25 per cent deduction— [185]

A. In our method of allocating costs we used the amount of 25 per cent off list to arrive at net. Through experience of many years, it might be a per cent or so, a fraction of a per cent one way or the other. We have on our pricing medium, as I recall, only the list price—no, it's not, either—

Q. Let me ask you then, the very first entry is the description. I can't read it. What is that?

A. That is a nut.

Q. The amount which would be the list price to a customer, 61 cents. Now, do you know what a nut would cost Halton Tractor? What did he pay for it?

A. Without referring to the pricing medium I couldn't tell you exactly what that particular nut would cost. I would say it would be very close to 75 per cent of this cost. It could be some 74 per cent, or it could be 75 and a quarter.

Q. And as far as parts was concerned, the practice of Halton Tractor Company is to simply add on

(Testimony of Frank Bostick.)

the 25 per cent charge over and above cost to make up just 25 per cent?

A. No. At Halton Tractor Company, we would take the list and reduce it by 25 per cent.

Q. That wasn't the question. I want to know from the cost what you actually paid for parts to the wholesaler or supplier or manufacturer, what is the markup? What is the difference between the cost and this price to your [186] customers?

A. Approximately 25 per cent.

Q. I see. Does it ever vary?

A. Very slightly. There are certain items where you get down to items that cost one cent or two cents, and they increase it by a cent. You have got 50 per cent increase on a one cent item or a fraction of a cent item. But that wouldn't tend to distort it enough to mention.

I might add that the method we used is generally accepted by Caterpillar distributors of comparable size.

Q. To market 25 per cent over cost?

A. The method which we used—now we don't. Our procedure is to take 75 per cent of list, not to mark up the cost.

Q. Yes; but you must know what your cost is. You must have to pay somebody something for that material that you sell. A. That is correct.

The Court: How do you arrive at list?

A. From a pricing medium, your Honor.

Mr. Sharff: From what?

The Court: Who prepares that?

(Testimony of Frank Bostick.)

The Witness: Caterpillar Tractor Company furnishes us with that.

Q. (By Mr. Blackstone): Would it be that you have invoices relating to the parts shown here that would show exactly what Halton Tractor, in fact, paid for these parts? [187]

A. Oh, very definitely.

Q. Could they be obtained and submitted for my inspection? We wouldn't have to necessarily continue the trial unnecessarily; we may be able to stipulate to that. A. Certainly.

Q. Just for my information to check this matter of costs. Well, I think it's not necessary to go through each one of these cards because I am perfectly willing to stipulate that the cards were prepared in the same way. I just wanted to find out how it was done.

Now, then, the next entry on this Defendant's Exhibit E under the cost column is Job No. 4306.

A. Yes.

Q. I think I would like to have you dig out all of these relating to these particular cards.

A. I will have them for all the work that was done in Los Banos, and it's quite possible that—may I say this—Yes; all the work that was done on this was done at Los Banos with the exception of this one; this is a Merced job number.

Q. And you do not have the records from Merced? A. No; I don't.

Q. They have been destroyed?

A. That is correct.

(Testimony of Frank Bostick.)

Q. But as far as you know—— [188]

A. The Merced—the procedure would be the same.

Q. The same. And these repairs would be items shown on these cards, then, they would be net labor cost and the list price of parts reduced by 25 per cent?

A. Yes, that is 4109. You will notice this item here of \$10.02. Because of the insignificance of the amount I did not go back—this indicates February cash receipt of \$10.02—I didn't go back to see what that was. I assumed that there might have been a small item that would be the only transaction like it in the entire sequence of operation. I merely brought it up.

Q. That is some kind of an adjusting entry, is that the idea?

A. I assume that there might have been some scrap metal or something removed from it and sold for that amount, which they applied to credit to the cost.

Mr. Blackstone: I should like to have this marked as Defendant's next in order.

The Court: Defendant's Exhibit G, which is this——

Mr. Blackstone: This is the summary of the papers relating to repairs.

The Court: Is this new? Has it already been marked for identification?

Mr. Blackstone: This is new. This relates to the entries shown on Defendant's Exhibit E. [189]

(Testimony of Frank Bostick.)

The Court: All right. That will be Defendant's Exhibit G.

(Whereupon, summary of repairs referred to above was marked Defendant's Exhibit G for identification.)

Mr. Blackstone: That relates to job No. 4036, and we are still talking about it.

The Court: It's another job sheet?

Mr. Blackstone: And we are still talking about the same tractor, DW-10 IN2581.

Q. Mr. Bostick, in looking over Defendant's Exhibit G for identification, would you refer to the pink sheets there and explain why some of those pink sheets indicate labor on them?

A. The account number, which is set up here in the right hand side, account No. 1338, indicates that it was labor done on the outside; in other words, done by another firm. For instance, this is repairing a tractor seat. We have no upholstery facilities. We send that out. The title of our account is "Outside services," "purchased for this account 1338."

The Court: And this would then be, of course, a net figure \$5 that is out-of-pocket costs to Halton Tractor? A. Yes; that is correct.

Q. (By Mr. Blackstone): Would you look up another one of [190] these pink sheets dated March 5th, 1948, and explain that entry?

A. The tag reads, "5 pounds of bronze, 80 cents"—the price should be over one column. Five pounds

(Testimony of Frank Bostick.)

of bronze, \$4; labor, \$4.20. Apparently there was some machine work done.

Q. Is there any account number to show this was done outside the plant of Halton Tractor?

A. No; there isn't.

Q. Would the labor item there, then, be a labor item of Halton Tractor's own labor?

A. It's possible; but I believe that that would be outside work done. I would have to refer back to the requisition, if it were possible to find it, to actually identify it. I assumed that it was, because ordinarily we won't bill our own labor. It would be picked up over here in the job card.

Q. However, this particular one that I referred to did not have that item 133-A, which you said was the ordinary way of referring to outside work done.

A. Yes; it's a common practice to identify it by the account number.

Q. Here's one of the pink slips dated March 13th, 1948, which shows a net figure of \$5.07 and no deduction of 25 per cent. Could you explain why that is?

A. Yes. You will notice that that account No. 132, which [191] is other new parts, those are priced out at net. We have, as Mr. Halton said yesterday, represented the John Deere Plow Company and the Caterpillar Tractor Company, and we also carry an allied line of parts. The inventory title of this account is "Other new parts," which we price at cost. We refer back to the inventory record where we do have the cost set up.

(Testimony of Frank Bostick.)

Q. That already has been put down at cost?

A. That is correct.

Q. I see. Now, referring to Defendant's Exhibit G, the first page, you will notice, Mr. Bostick, under the "Hours" column, there is no hours shown that exceed eight hours, is that correct?

A. That is correct.

Q. Was overtime paid by Halton Tractor Company when a man worked less than eight hours a day?

Mr. Sharff: What was the question?

Mr. Blackstone: I asked if they paid overtime when a man worked less than eight hours a day.

A. On holidays there would be such provisions. I am not familiar with the labor arrangements with the organization at that time. I would assume that on holidays or on Saturdays overtime would have been paid.

Q. If overtime had been paid, would it not be shown in the "Amount" column, the last amount column being the net? [192] Actually, the Defendant's Exhibit G does not have shown on it the list and net. Would it be all right if that were put on in pencil simply to make it accord with Defendant's Exhibit F? Would you have any objection to that being done so that the exhibits will—I take it, Mr. Bostick, since the net column would reflect the actual payment paid to the mechanic who is shown as working on the job, if in fact he had been paid overtime, that would have been shown in the net column?

(Testimony of Frank Bostick.)

A. That is correct. However, it would have been set out in here. You will notice these items in red; anything other than straight labor is ordinarily set out—in other words, overtime would be set out separately. This happened to be one hour travel time. This would be steam cleaning, which is at a different rate; painting is at a different rate. So it would ordinarily have been set out.

Q. Now, referring to Defendant's Exhibit G you will note that—

A. Excuse me. May I show you here, here's one where overtime was charged, just to show—

Mr. Blackstone: Let's have it marked for identification if we are going to refer to it.

The Court: H. Defendant's Exhibit H. What is the purpose of this cross-examination, Mr. Blackstone? It may be interesting as to the system of bookkeeping. [193]

(Whereupon, the document referred to above was marked Defendant's Exhibit H for identification.)

Mr. Blackstone: Well, your Honor, I want to be sure that we have gotten simply costs in this—costs to Halton Tractor, because my theory is he is certainly not entitled to make a profit every step of the way here.

I think that insofar as this whole issue is concerned, really, we are not conceding even that the court has to get to it; but assume that they have reached this point, certainly the most they are en-

(Testimony of Frank Bostick.)

titled to, as far as we are concerned, is their actual out-of-pocket costs. They have added in that summary certain overhead, which I think I am developing right now. It is simply not justified. If we are talking simply about costs—

Mr. Sharff: I haven't noticed such items; probably I have been sleeping or—

Mr. Blackstone: I think we are going to get to it right this minute.

The Court: All right.

Mr. Blackstone: However, Mr. Bostick wanted to refer to Defendant's Exhibit H.

The Court: Well, how could overtime affect profit or anything of that sort unless there was—

Mr. Blackstone: Oh, I beg your pardon. I appreciate [194] your interrupting because what I had in mind—I was confused, I thought this overhead meant overtime, and so there I have been wasting some time. May I just take a moment to collect my thoughts here?

The Court: It would be a very good time for the recess. We will take our morning recess, anyway, but to me—

Mr. Blackstone: That is what I thought, that's what I was driving at.

The Court: —but if you want to arrive at the overhead part of it, if there is—

Mr. Blackstone: Well, I do; yes.

The Court: If there is a profit in overhead—but I take it the overhead that he is charging is just overhead for expense of operation. I take it there

(Testimony of Frank Bostick.)

is a charge made on each job as a proportionate share of overhead based on some sort of a ratio or figure or formula that you have previously determined; isn't that correct?

The Witness: That is correct, your Honor.

The Court: And that is an expense of the operation?

A. That is correct. In other words, to arrive at our costs—actually what overhead is, or costs, it can't be specifically allocated, such as heat, light, water and power, depreciation and so forth. It couldn't be allocated directly to any one job. So our practice is to lump all of these expenses applicable to the operation of the shop together, [195] and divide it by the number of man hours to arrive at the cost per man hour. That is how this rate is arrived—the method of computation of this rate is arrived at.

The Court: It's a formula, and then you just apply it and save yourself—

The Witness: There are two factors involved, the direct labor and the overhead.

The Court: Yes. Now, as I say, the reason I ask this question, Mr. Blackstone, is I am as much concerned about the cost question as you are, but—

Mr. Blackstone: Well, I have been on the wrong track, your Honor, because I got confused and thought of overhead as overtime and I have wasted the Court's time. I apologize.

The Court: There is no problem in that. Any-

(Testimony of Frank Bostick.)

way, it's 11:00 o'clock and we will take our recess. If you want to check your figures, you can. We will see if we can cover this as rapidly as possible.

Mr. Blackstone: Mr. Bostick, perhaps we can shorten this up. I would like to have in evidence all of these detailed breakdowns of the repair jobs for the one tractor or No. IN2581. Now, we have identified exhibits—

The Court: F, G and H.

Mr. Blackstone: And H did not relate to that tractor. I don't believe it did. I will introduce that into evidence.

Q. Could you find—well, 4109 is the Merced repair job? [196] A. That is correct.

Q. And you won't have a record of 4109—is it Merced?

A. No; that is the Los Banos job, I believe. We had that 4109. Yes; that is this one. I believe the original job has already been put into evidence, 3988.

Mr. Sharff: That is the one for \$178, isn't it, Mr. Blackstone?

The Witness: Yes; that is this one. You see, these three jobs—

Mr. Blackstone: 4038—has this been marked for identification? Could that be marked?

The Court: All right. Defendant's Exhibit I.

(Thereupon, the document referred to above was marked Defendant's Exhibit I for identification.)

(Testimony of Frank Bostick.)

Mr. Blackstone: I would like to offer into evidence at this time Defendant's Exhibits E, F—

The Clerk: G?

The Court: G and I?

Mr. Blackstone: G and I.

The Court: Is there any objection? They will be admitted into evidence, in accordance with the letters with which they have been marked for identification.

(Whereupon, Defendant's Exhibits E, F, G and I heretofore marked for identification [197] were [received in evidence.]

The Court: That leaves H still marked for identification and it will not be admitted into evidence.

Mr. Blackstone: Yes.

Mr. Sharff: There is one qualification, Mr. Blackstone. If in our investigation some questions appear about the contents of these exhibits, I would certainly like the opportunity to present an explanation of the items.

Mr. Blackstone: I don't know what exception—

The Court: We will pass on this. I don't know what the answer is going to be.

Mr. Sharff: I don't either, your Honor. I can't anticipate the future either, so—

Q. (By Mr. Blackstone): The next part of this Plaintiff's Exhibit 10 that I should like to inquire about, Mr. Bostick, is item A, "Sales department operating expenses. \$7,931.25." Is it correct that

(Testimony of Frank Bostick.)

you took the total overhead expenses for the year and then arrived at some ratio to apply to the sales that are shown on this exhibit?

A. The sales department operating expense or operating expenses of the sales department itself—you realize we have a departmental cost breakdown, an expense breakdown. The base figures used in arriving at this computation were those expenses allocated to the sales department incurred directly and indirectly by the sales department. If I refer to my notes, I can give you the exact figures on the [198] basis of the computation.

Mr. Blackstone: Yes; please do.

A. For the year's operations, 1948, total sales attributed to sales department for \$1,397,478 omitting the cents; the total operating expense, direct and indirect, allocated to the sales department was \$191,689, which is 13.72 per cent of the total sales. I might add that these costs are not reflected in the shop overhead at all. There is no relation to them.

Q. And then you arrived at your figure of \$7,931 by taking 13.52 per cent of—

A. 57.

Q. \$57,807.97, is that correct?

A. That is correct.

Q. Could you explain to me why you included in your \$57,000 for this purpose the sales of the Chevrolet and Ford pickups which were not handled by Halton Tractor Company at all?

A. They were handled by us. We took—

Q. It's my understanding that, from the testi-

(Testimony of Frank Bostick.)

mony of Mr. Halton, the McAuley Motors made the sales. Do you have any independent knowledge of those sales?

A. I do not. They did handle the sales. However, we took them—

Q. I think that answers my question. You have no independent knowledge of the transaction, you were not employed by [199] Halton Tractor Company at the time, were you?

A. No; I was not. However, I feel that I have information that will be pertinent to this point which I would like to offer.

Q. Based on what?

A. On the mechanic and the way the transaction was handled, because they still get into our costs.

Mr. Blackstone: Well, your Honor, I think that if the man wasn't there and didn't participate in the transaction, there is no basis for his testifying.

The Witness: However, I can refer to the records at that time.

Mr. Sharff: He has the inventory cards covering these two trucks.

The Court: I will permit him to; it's in reference to the records.

The Witness: If you will recall, your Honor, a portion of the amount used in arriving at the total cost in the amount of \$48,496.10, one of the components was a \$2,200 check written to the United States Government. That was the amount of the proceeds of the sale of a 1946 Ford pickup and the 1942 Chevrolet coupe. We had to allocate that ex-

(Testimony of Frank Bostick.)

penditure and it was thrown into the cost of the initial acquisition.

You will notice in the schedule—I am sorry, I have forgotten the exhibit number—where they are set out with the [200] initial cost. I believe it's the second and fourth items set out. So it did go through our books. Yes; they are set up, the amount of money and initial cost; that is, the Ford pickup and Chevrolet coupe are set up as \$1,000, \$1,200 respectively, from the source of the entry, being from the initial check.

The Court: Yes.

The Witness: Paid to McAuley's.

Mr. Sharff: And the inventory card, I might add, is right in front of Mr. Blackstone now.

The Court: The \$2,200 was paid by McAuley?

The Witness: To us.

The Court: To Halton, yes; which in turn was paid to the Government.

Q. (By Mr. Blackstone): But you have no independent information as to what other than book-keeping entries were made by Halton Tractor in connection with the sales of those automobiles?

A. No.

Q. What are the component parts of the total operating expenses in the sales department?

A. Oh, I have a breakdown here before me, and I will read them and also explain the method of allocation. The first series of expenses are direct expenses.

Q. What do you mean by that? [201]

(Testimony of Frank Bostick.)

A. Expenses incurred directly in the operation as opposed to such things as administrative expenses, which are allocated—a portion of which are allocated to the sales department, while the direct expenses are in their entirety incurred by the sales department, such as—

Q. Does that include sales and salaries and commissions?

A. Salaries, traveling expense, policy allowance. I will give you an explanation of any of these items if you require it.

Advertising, delivery, and revisit, warranty, truck and car expense, loading and unloading of equipment, servicing new machines, demonstrations, and miscellaneous sales department expense. Those comprise the direct expenses charged to the sales department operation.

Indirect expenses: first is office expense, which includes salaries, legal and audit, travel, stationery and supplies, postage. A portion of this expense is allocated to the sales department on the basis of percentage of sales, which is the accepted method of allocating this particular type of expense.

The next category of classification of expenses is entitled "General expense," which includes insurance other than building—it is almost entirely payroll insurance, which is allocated to the sales department on the basis of payroll dollars—taxes other than building, which are the same thing, [202] payroll taxes allocated on a basis of payroll dollars and departments; depreciation other than buildings,

(Testimony of Frank Bostick.)

as allocated on the value of machines and departments.

Q. Depreciation on what items?

A. On depreciation of the machinery and equipment other than buildings. In our cross-breakdown we set up—

Q. On your tools and on that sort of thing? Is that what you mean primarily?

A. Well, that is primarily automobiles and tools used and purchased for the sales department, such as automobiles and that nature of item used by the sales department in the course of their operations.

Q. It's not depreciation on your inventory or anything of that sort?

A. No. Oh, no. Heat, light, water and power, and disposal. The basis of that allocation is on percentage of floor space. Telephone and telegraph is based on estimated usage. Dues and subscriptions and donations based on percentage of sales. And employees relations expense is based on payroll dollars per department.

We come to the next category of indirect expense, occupancy expense, comprised of building insurance, real estate, taxes, building depreciation, building maintenance and repair, and building rentals. The sum of these expenses are allocated to these various departments on the basis of [203] floor space.

Our final indirect expense is administrative, which is comprised of salaries, travel expense, automobile

(Testimony of Frank Bostick.)

expense, which is allocated on the basis of percentage of sales of departments.

The total amount of these expenses, direct and indirect, allocated to the sales department for the year 1948 is in the amount of \$191,689.

Q. Now I believe you have stated that in computing the initial cost column that you used the amount outstanding under the conditional sales contract and under the chattel martgage of October 2nd, 1947, is that correct?

Mr. Sharff: Plus the amount paid to the Government.

A. And accrued interest.

Q. (By Mr. Blackstone): Is that correct?

A. Yes.

Q. Now, would you tell me how you computed the accrued interest under the conditional sales contract to January 31st, 1948?

A. Would you refer to the exhibit of the conditional sales contract? I would like to point out a term there.

Q. Yes.

A. I believe it's right on top, the pink one there. You will notice down there a provision for interest rate. I will read this: "With interest on deferred payments at the [204] rate of 7 per cent per annum from the date April 2nd, 1947, to maturity, and 9 per cent after maturity." I used the basis of 9 per cent in arriving at the interest due under conditional sales contract because the maturity date had passed and—

(Testimony of Frank Bostick.)

Q. What did you take as the maturity date?

A. I based my computation from January 31st, 1948, because if you recall the interest had been accrued and credit allowed for up to that period of time.

Q. Well, I would like to know what records you have in regard to the amount outstanding on January 31st, 1948, under the conditional sales contract; what records are there to show the exact amount, principal and interest, to January 31st, 1948?

A. The information I used in my computations was from a journal entry that was taken from a ledger card, which I don't happen to have in my possession at the time. However, I am sure it can be developed.

In other words, each individual contract is set up on an individual ledger card, the record of payments made and the schedule of payment is set out there on a description of the equipment, terms of interest and other pertinent information.

Q. You stated on direct examination those showed a balance on the conditional sales contract on January 31st, 1948, of [205] \$14,594.06 principal.

A. Correct.

Q. And interest up to that date of \$351.78?

A. Correct.

The Court: Where are you getting that figure?

Mr. Blackstone: This was his direct testimony.

The Court: I mean it's not on the sheet here.

Mr. Blackstone: No.

The Court: That is the basis for the allocation?

(Testimony of Frank Bostick.)

Q. (By Mr. Blackstone): That's right. Now, was that interest figure \$351.78 computed on the basis of 7 per cent or 9 per cent?

A. I will assume, because of the practice, that it was based on 7 per cent to maturity and whatever period of time from maturity to January 31st, it was based on 9 per cent on the delinquent portion.

Mr. Sharff: You didn't figure it yourself?

A. I did not figure it myself. I did not go back and check this computation.

Q. (By Mr. Blackstone): So you don't know how that interest figure was computed? You simply take it from a journal entry?

A. That is correct.

Q. And that came from a ledger?

A. Yes. [206]

Q. Or was it the other way around and not—

A. The entry on the journal was made from the source of information on the ledger card. So my—

Q. Then your computation thereafter for item D on Plaintiff's Exhibit 10, which is interest accruing under conditional sales agreement and mortgage, and referring only to that portion related to the conditional sales agreement, you used the rate of 9 per cent? A. Correct.

Q. On the balance. And that included the balance of principal and interest, is that correct?

A. It did not; only because we had already given Watson credit for that interest at that time. So it was merely on the principal amount of \$14,594.06.

(Testimony of Frank Bostick.)

Q. What do you mean, you have given him credit?

The Court: He has already put in the initial cost figures.

Mr. Blackstone: Oh, I see.

The Court: That is what I was going to ask you, if you hadn't already taken it in initial costs, but you haven't; that is—

The Witness: In addition, your Honor.

The Court: That is another interest item?

The Witness: Correct.

Q. (By Mr. Blackstone): Well, is interest included in the [207] initial cost, your interest up to January 31st? I thought it was.

A. That is correct, up to January 31st.

Q. \$351.78 was included in your cost column?

The Court: But he is now saying that that item of interest is another interest.

Q. (By Mr. Blackstone): That is right. It's accruing thereof, and you base that upon the principal, on the amount of \$14,594.06?

A. That is correct. I might add the period of that computation is from February 1st, 1948, to December 30th, 1948.

Mr. Sharff: Would it be also, or to the earlier date when the item was sold?

Mr. Blackstone: Let me—I think I can get into this.

Mr. Sharff: I am sorry.

Q. (By Mr. Blackstone): Are you familiar, Mr. Bostick, in Plaintiff's Exhibit 10, which of these

(Testimony of Frank Bostick.)

items are covered by the conditional sales contract? I think there can be an easy comparison made here, and if you haven't—the last five items.

A. On the conditional sales contract.

Q. Are the conditional sales contract items, except for the next to the last item—that is, DW-10 scraper 145, covered by the chattel mortgage?

The Court: 146, you mean. [208]

Mr. Blackstone: Well, it's 145 on mine.

The Witness: The items covered by the conditional sales contract?

The Court: Well, if I am looking—I mean—

Mr. Blackstone: Six—I don't know. It might be a typographical error on the copy. What do you have, 146, your Honor?

The Court: Mine says 146, CW-10, 566, CW-10 scraper 146, and CW-10 scraper 566.

Mr. Blackstone: Mine was 145.

Mr. Sharff: Mine does—it would be—

The Court: This is the one that is in evidence, so maybe we had better get—

Mr. Sharff: Let's get it straightened out right now.

The Witness: I have my original worksheet.

Mr. Sharff: These were typed, your Honor.

Mr. Blackstone: Your Honor, if you will refer to Defendant's Exhibit A, the chattel mortgage of October 2nd, 1947, it identifies a LaPlant Choate carryall, serial No. CW-10, 145.

The Witness: That is correct.

(Testimony of Frank Bostick.)

Mr. Blackstone: I think that would be the correct number.

The Court: Let's correct it, then.

Mr. Blackstone: May it be corrected, then, [209] on Plaintiff's Exhibit 10?

The Court: Referring to the conditional sales contract, CW-10 tractor, IN 2792, the LaPlant Choate CW-10 scraper, 566, and LaPlant Choate scraper, 5668.

Q. (By Mr. Blackstone): Now, all of those items, then, are shown as having been sold on December 30th, 1948?

A. That is correct.

Q. And that is taken from the records?

A. Correct.

Q. So you computed then interest up to that date? A. That is correct.

Q. At 9 per cent on that principal figure of \$14,594.06? A. That is correct.

Q. All of the other items, then, on this list are covered by the chattel mortgage, which is Defendant's Exhibit A, the mortgage of October 2nd, 1947, isn't that correct? A. That is correct.

Q. Now, would you state how you computed that portion of the interest shown in item D on Plaintiff's Exhibit 10, which you say is attributed to the chattel mortgage property?

A. Yes. I computed that on the basis of the interest as set out in the Industrial Loan Act, referring to the rates of the Morris Plan mortgage and using those figures.

(Testimony of Frank Bostick.)

Q. Which mortgage did you refer to for the interest rate?

A. I referred to the Morris Plan mortgage for the interest rate. [210]

Q. And do you recall what the Morris Plan mortgage rate was insofar as interest was concerned?

A. Two per cent per month on the first \$300 and one-half per cent per month on the balance.

Mr. Sharff: In other words, six per cent, then?

A. I beg your pardon?

Q. Six per cent, then, one-half of one—

Q. (By Mr. Blackstone): I read to you from Plaintiff's Exhibit No. 2, being the Morris Plan chattel mortgage providing: "In event of prepayment or default of more than fifteen days, interest, charges, collection costs and attorneys' fees at the highest rate allowed by the Industrial Loan Act, according to the terms of a certain promissory note of even date herewith executed and delivered by mortgagor unto mortgagee and any renewals thereof."

Have you found in this mortgage, Plaintiff's Exhibit 2, any more specific reference to the interest rate under that mortgage?

A. I didn't refer to this. I mean, as far as the rate, that was merely for the authority to charge the interest rate.

The Court: Yes, but there is no other rate there so far as you know?

The Witness: As far as I know, no, sir.

(Testimony of Frank Bostick.)

The Court: Isn't that as far as you know, [211] Mr. Blackstone, there isn't any?

Mr. Blackstone: No, as far as I know.

Q. Did you refer to any promissory note to see if any specific rate of interest was set forth?

Mr. Sharff: Pardon me, Mr. Blackstone. Probably we can shorten this. We will stipulate to the rate which Mr. Bostick used. It was the one we obtained from the Morris Plan and supplied to him as the rate to be applied under the Industrial Loan Act.

Mr. Blackstone: I appreciate that, but I wanted the question answered, nonetheless.

The Court: Would you rephrase the question again?

Mr. Blackstone: I am sorry, Judge.

Q. I said, did you refer to any promissory note to determine the rate of interest to be used in computing the interest item for the chattel mortgage property shown in Exhibit 10?

A. You mean as a basis for the rate?

Q. Yes. A. No, I did not.

Q. You then used the figure set forth in the Industrial Loan Act of California?

A. That is correct.

Q. Do you know what rate of interest is charged under the second mortgage, that one dated October 2nd, 1949? [212]

A. I don't recall offhand. I didn't refer to that in my computation.

Q. Did you refer to any note in connection with

(Testimony of Frank Bostick.)

the second mortgage for interest purposes, any promissory note?

A. No, I didn't. I don't believe that we were able to absolutely locate it at the time.

Q. Now then, on the basis of the interest figures you used, would it be correct to say that you took the principal—oh, pardon me, before I ask you that question, may I ask you in regard to that cost column, that component that is made up of the balance outstanding under the chattel mortgage of October, 1947, you stated on your direct examination was a principal amount of \$23,000. You stated that the interest item under the mortgage, chattel mortgage, was \$562.27? A. That is correct.

Q. Computed, I take it, to January 31st, 1948?

A. Correct.

Q. Now, was that interest item computed, do you know? A. No, I don't.

Q. You don't? A. Except—

Q. You don't know what rate was used?

A. I merely attested the figure as set out by my predecessor.

Q. Then I take it that you began your interest computation [213] here for purposes of your item D on Plaintiff's Exhibit 10 by taking the principal sum, \$23,000? A. That is correct.

Q. And you applied the Industrial Loan Act provisions to that sum up to the date of the very first sale of the item of equipment, did you?

A. That is correct.

Q. That would be February 6th, 1948, the date

(Testimony of Frank Bostick.)

on which the McAuley Motors sale of the pickup and Chevrolet were made?

A. That is correct.

Q. Then would you describe what you did with that figure? Do you have the figure in front of you, just what that amounted to?

A. Yes; I have the computation here.

Q. I would appreciate it if you would show us the way you computed it.

A. I reduced the balance of principal for the purposes of applying the interest rate as the items were sold. For the period February 1st, 1948, to March 9th, 1948, I used \$23,000. From the period March 9—

Q. In other words, you did not give any credit on February 6th for the sale for \$2,200 of the two automobiles?

The Court: That is because they weren't covered by the mortgage, by the note.

Q. (By Mr. Blackstone): Oh, but he used the chattel mortgage— [214] oh, I see.

The Court: They weren't covered by the Morris Plan chattel mortgage.

Mr. Blackstone: I beg your pardon. I see.

The Court: That is why they didn't.

Q. (By Mr. Blackstone): That was covered by the Morris Plan?

A. That is correct; but the automobiles don't enter into the computation at all.

Q. I see.

A. From the period March 9th to the period

(Testimony of Frank Bostick.)

April 6th, 1948, I used the amount \$8,000 as the basis for the application of the interest rate.

Q. In other words, you reduced the principal by \$15,000, is that correct? A. Yes.

Q. I notice that the first two entries on Exhibit 10 show a sale, two sales, on March 9th, 1948, totaling \$21,000? A. Yes.

Q. Can you explain why you did not decrease the remaining principal thereafter by \$21,000?

A. Yes. The total cost allocated to the equipment sold by us, with repairs, \$23,000 from the mortgage, and a balance of \$4,000 from payments to the Collector of Internal Revenue equal \$27,000. So I reduced the amount. In other words, [215] I used 23/27ths in basing my interest computation.

The Court: Oh, you reduced the amount that was due on the Morris Plan mortgage by the percentage that—

A. In applying the costly deduction factor, your Honor, for the purpose of computing interest.

The Court: I see.

Q. (By Mr. Blackstone): You didn't treat this as a situation where, just a simple situation where \$23,000 principal was owing and you received \$21,000 on March 9th, leaving \$2,000 principal remaining to be paid? You didn't use that simple formula? A. No.

Q. Very well. Would you continue with April 6th, then; up to April 6th you used the remaining principal of \$8,000 to compute interest. What was

(Testimony of Frank Bostick.)

the next figure of principal you used on which you computed interest?

A. The next figure I used for computing interest was \$7,582.33.

Q. For what period?

A. For April 7th, 1948, to May 26th, 1948. Now I would like to go back here for a moment. I would like to, if I may, study this for a moment, your Honor, because I have kind of forgotten exactly the method I used here. I remember the method but I am trying to recall exactly what my basis was here. [216]

The Court: Yes.

A. I have a note here in my working papers after the \$8,000 figure. This will enter into this \$23,000 less .8333 times \$18,000 and—which is the initial cost of \$18,000—

Q. (By Mr. Blackstone): It's the initial cost of what? A. Of the first CW-10's.

The Court: \$21,000. Was \$18,000 on the books?

A. I have forgotten just exactly what relationship I was working at the time on that. I will go ahead and continue to give you the method of computation. You can check it out. The next item was \$7,583.33.

Q. (By Mr. Blackstone): That was up to May 26th, 1948, on which date there was a sale of CW-10 scraper, serial No. 136 for \$2,250, correct, the sale to Bud & Quinn?

A. That is correct.

(Testimony of Frank Bostick.)

Q. And then the figure, the balance, you did not use again the formula of deducting \$7,583, \$2,250?

A. Yes, I did. I took \$7,583 less .8333 times \$2,000 to arrive at a figure of \$5,916.66.

Q. \$5,000 what?

A. \$916.66, which was used for the basis of the computation for the period May 27th, 1948, to August 23rd, 1948.

The Court: That's the date.

Q. (By Mr. Blackstone): May I ask then the sales shown here of three diesel fuel tank wagons, 6/9/48, 6/23/48, 7/17/48, [217] you did not use that to reduce the principal outstanding?

The Court: That's for the same reason.

Q. (By Mr. Blackstone): For the same reason it was not covered by the Morris Plan chattel mortgage?

A. That is correct. The last computation was based on the figure of \$4,040.57 resulting from the computation of .8333 times \$5,916.66—I am sorry. May I restate that?

Q. Yes.

A. It was \$5,916.66 less .8333 times \$2,250, which gave us the resulting figure of \$4,040.57.

The Court: Well then, what happened when you made the \$4,500 sale on 8/23/48, the DW-10 tractor?

Q. (By Mr. Blackstone): You did not deduct \$4,500 then, from \$5,916.66 to—

The Court: Aren't you confusing that with—not you, I am now talking to the witness. Aren't you confusing this transaction with the one that

(Testimony of Frank Bostick.)

occurred on 5/26/48? I think you are just one behind.

The Witness: 5/26/48?

The Court: Mr. Blackstone is referring to the transaction of the DW-10 tractor No. IN 2173 which took place on 8/23/48, for \$4,500, which is probably the last transaction. I don't know whether it is or not, but I just say probably it is the last one concerned with the Morris Plan property.

Mr. Blackstone: Well, the last one is CW-10 scraper 146. [218]

The Court: Oh, yes, that is it—or 145? Let's get that straightened out now. I changed it to 6.

Mr. Blackstone: I changed mine to 6.

The Court: I corrected the original.

The Witness: The last sale was made on—

Q. (By Mr. Blackstone): December 30th, was it?

A. December 30th, which included a DW-10 IN 2167, and CW-10 was 145.

The Court: Yes, I know that.

The Witness: And the amount allocated to that piece of equipment for the period 8/24 to 12/30/48, was \$4,040.57.

Q. (By Mr. Blackstone): And how much did you consider was received on 12/30/48, for those two pieces of equipment? A. \$5,031.52—31.02.

The Court: 31.02.

Mr. Blackstone: That was the proceeds?

Mr. Sharff: 2 or 3?

The Witness: That was the proceeds.

Mr. Sharff: I am looking in the wrong column.

(Testimony of Frank Bostick.)

Mr. Blackstone: The DW-10 IN2167, which is the one covered by the chattel mortgage of the Morris Plan on October 2nd, 1947, show the sales of \$11,150.31, and that included scraper No. 145, according to the exhibit.

The Court: What is the question before the witness?

Q. (By Mr. Blackstone): Well, I am asking him if he wants [219] to revise his answer when he says that the amount of the sales price on the chattel mortgage equipment, the last sale, was \$5,-131.02. It's in conflict.

A. Our schedule is in conflict but the original records—

Q. Which is correct, then?

A. Item No. 1 should be DW-10 tractor IN 2792. These two I just transposed, these two figures.

Q. Well, I am concerned with the sales price of IN-2167, which on our Exhibit 10 is shown as the sales price as being \$11,000—

A. I now note that the serial numbers have been transposed in the schedule, in referring back to my original worksheet that the amount—

The Court: The amounts of money have been transposed?

The Witness: No. The amounts of money—the position of the serial numbers in preparing the schedule have been transposed.

Mr. Blackstone: That could be a typographical error in typing this, your Honor.

The Court: Certainly, that is all right.

(Testimony of Frank Bostick.)

Mr. Blackstone: We had a great deal of problems, your Honor, in typing the schedule because you can't get a wide carriage machine for love or money at this time of the year, at income tax time. We had to use a single carriage machine, and the typist had to hold it over and work it this way [220] (indicating).

The Witness: Well, the amount—I believe the answer to Mr. Blackstone's question, your Honor, is \$5,131.02, actually, regardless of the reflection on the exhibit, which will have to be changed.

Q. (By Mr. Blackstone): And then thereafter you did—I just want to be sure to get the figures changed right.

The Court: You say the serial numbers are transposed?

A. In position.

Q. Actually, IN or IN-2792 should be in the place of IN-2167? A. That is correct.

Q. And vice versa? A. That is correct.

Mr. Blackstone: Let's look at the inventory card.

A. I have it on the original worksheet.

The Court: Let's do it now. Those are the only matters which have to be changed. All the other figures are accurate with the exception of the serial number. Item No. 3 should be IN-2791 instead of 27791. Just strike the one 7.

The Witness: Correct.

Q. (By Mr. Blackstone): And you are stating you are reversing then the serial numbers?

The Court: I think what we had better do is

(Testimony of Frank Bostick.)

not only reverse the serial numbers, but also the initial cost items. [221] Are they correct?

The Witness: The initial cost items are correct, your Honor.

The Court: You mean if you reverse—

The Witness: That is correct. I will offer my original worksheet for your examination.

The Court: All I care about is I just want to have the, be sure that we have it accurately. Put these in here and—

Mr. Blackstone: The inventory cards, your Honor, corroborate the statement. It's a typing error.

The Court: Well, it isn't a question of disbelieving the man. All I want to find out is what it is. His position is, as I understand it, is that these inventory numbers, serial numbers, are just transposed.

Mr. Blackstone: And that's all.

The Court: And that's all.

Mr. Blackstone: That is what I understood and I just—

The Court: So if we rearrange these inventory numbers—

Q. (By Mr. Blackstone): So from then on the item shown in parentheses 2 would be the equipment under the title and the one under parentheses 1 would be under the conditional sale, is that correct?

A. That is correct.

Q. And all the other figures along the columns

(Testimony of Frank Bostick.)

are correct and don't need to be transposed, I take it? [222]

Well then, on December 31st—

The Court: Well now, I will make the change here in pencil. So that there won't be any—let's see, that would be 2167 and 2792. All right, I think that covers it.

All right, Mr. Blackstone, go ahead.

Q. (By Mr. Blackstone): Then after December 30th, 1948, you had considered in your interest computation that the full principal and no further interest was computed thereafter, is that correct?

A. There was no further interest computed thereafter, no.

Q. The next item I would like to ask you about is the item shown as E parentheses on Plaintiff's Exhibit 10. This difference between actual overhead and base rate charge of \$276.89—

The Court: Is that marked E?

Mr. Sharff: Are there two D's in the copy you have, your Honor?

The Court: Yes, it should be E.

Mr. Sharff: That last one D and E, not two D's.

The Court: All right.

The Witness: In the year 1948 we used an applied overhead rate of \$1.15 an hour. At the end of the year—

Q. (By Mr. Blackstone): Now let me be straight about this in my own mind at this time. This is a

(Testimony of Frank Bostick.)

shop overhead rate, overhead which is in addition to the sales department overhead [223] that we have already gone into as item A?

A. What do you mean, in addition?

Q. Well, item A you were talking about, what I would call overhead expenses—would that be a misnomer to categorize item A as sales department overhead expenses?

A. That is right, that was that.

Q. And then this item E is additional shop overhead? A. That is correct.

Q. We saw on Defendant's Exhibits E, F, G and I that in the net column there is an overhead item entered. Now, would you explain what that overhead item that is made up on those exhibits came from?

A. Yes. In using the applied rate of \$1.15 an hour, the total hours—if you will notice in the hours column—have been added, and the overhead, the applied overhead rate of \$1.15 times the number of hours will give you the amount of money set out in overhead.

Q. On each one of those exhibits?

A. On each one of those.

Q. That you say was done in advance and—

A. That is correct.

Q. And at the end of the year, then, you figure actual overhead and— A. At \$1.33.

Q. And that is the correcting figure in [224] item E? A. Yes.

Mr. Sharff: Pardon me, I didn't get something. Mr. Blackstone, you said something about something

(Testimony of Frank Bostick.)

being a misnomer. Was your question that item A, sales department—

The Court: Sales department operating expense includes an item for sales overhead.

Mr. Sharff: Oh.

The Witness: That is sales overhead.

The Court: Well, is that the whole sales overhead?

The Witness: I thought it included—

Mr. Blackstone: Well, it included other things besides sales, didn't it, the share of administrative expense and all those things?

A. Yes, but that is part of the sales expense. It's an indirect application.

The Court: Yes, but I thought when you said when you made up this figure you made an allocation for certain overhead, administrative overhead, in the sales department operating expenses. Now are you using overhead as synonymous with operating expenses?

A. I believe Mr. Blackstone was. I call it sales operating expense.

Q. Which includes overhead?

A. Well, it was overhead; in a general usage it would be considered overhead. But as far as the technical explanation, [225] it's an operating expense of the sales department.

The Court: In any event, Mr. Blackstone, it's different from the item he is talking about in item E.

(Testimony of Frank Bostick.)

Mr. Blackstone: It may or may not be, your Honor.

The Court: That is what he says it is.

Q. (By Mr. Blackstone): Well, what items are included in this \$1.15 figure that you first estimate per hour? What are the component parts of that?

A. Direct service department expense, which I shall enumerate.

The Court: What do you mean by "direct service department"?

A. In other words, expenses incurred directly for the benefit of the service department, such as service supervisory salaries.

Q. Well, it isn't sales; it doesn't have anything to do with sales?

A. It doesn't have a thing to do with sales. You see, we break down our costs departmentally.

Q. I understand that. You have a sales department, service department?

A. Parts department.

Q. Parts department. All right. Now then, go ahead with the service department.

A. The service department direct expense is comprised of [226] service supervisory salaries, which are the general service manager, the three shop foremen, and the cost clerk. The service department, auto and truck expense, are small tools, supplies, and repairs, travel expense, service department vacations, and shop cleanup.

The indirect expenses applicable to the service department are portions of the same expense ap-

(Testimony of Frank Bostick.)

plied to the sales department. As I explained before, office expense is assigned departmentally on the basis of percentage of sales. The general expense, including—will it be necessary for me to review this, your Honor?

The Court: No, unless you want it in.

Mr. Blackstone: No, no, you have already outlined it.

The Witness: Yes, that is correct. Now those total expenses at the end of the year are added up and divided by the total number of man hours expended by the service department, arriving at a cost per hour of operation of the service department of \$1.33 for the year 1948. If you would like the figures, the exact figures on that, I have them here.

Q. I would like to ask if you have the figure of the total overhead expense for 1948 for Halton Tractor?

A. Including sales department, service department, and parts, the amount is \$312,985, taking into account—

Q. And you allocated that \$191,689 to sales; how much to [227] shop?

A. I don't have the rough percentage. I can give you the amount of money. The service department overhead was \$47,754.

The Court: Parts is the other one?

A. Parts department, \$73,542.

Q. (By Mr. Blackstone): And you say that taking the total number of labor hours put in dur-

(Testimony of Frank Bostick.)

ing 1948, you have that figure divided into \$47,754, comes out \$1.33 per hour?

A. That is correct. There were 64,695 hours.

Q. How many, 64,695 hours? A. Yes.

Q. And 64,000 into 47,000 comes out \$1.33 an hour?

A. You cut me off previously in an explanation. This 47,000 is a net figure; to that must be added the overhead credit to arrive at the actual overhead expense.

Now this will require an explanation of our procedures. When we charge time out, for instance, on used equipment, or other companies, which we classify as company expense maintenance, we charge, say, building expense, we credit labor, we credit overhead. That overhead credit reduces the over-all sales department expense as far as the total goes; but in arriving at our overhead cost, that credit is eliminated. That credit is not included. The figure you want to divide—your 65,000 hours is in \$86,127.

Q. Why? [228]

A. Because that is the total operating expense of the service department.

Q. I thought you said you had the figure 47,754 and you— A. That is after giving—

Q. And these figures you gave me add up to the total overhead expense of \$312,985?

A. The ones I originally gave do, but they take into effect the service of the department of the shop, overhead credit—

(Testimony of Frank Bostick.)

The Court: Well, Mr. Blackstone, it's ten minutes after 12:00. If you want to go into these matters, I suggest that some sort of a conference be had if you are going to.

Mr. Blackstone: Well, I am practically finished.

The Court: Well, I don't want to foreclose you. All I want to do is get the thing worked out so we can get the record made without any argument, if necessary. Did you want to examine him on further subjects?

Mr. Blackstone: I think I have finished. I wanted to go through all these items.

The Court: Well, he will be available after the lunch hour. Do you have any redirect examination?

Mr. Sharff: Not at the moment, your Honor. I only have a very short rebuttal and redirect examination. I did want—if you are going to adjourn at this time, your Honor, I [229] would like to know—

Mr. Blackstone: Oh, there is something, but it shouldn't take long.

The Court: Well, take it up after lunch, after the noon hour. You want to put some documents in, don't you?

Mr. Blackstone: Well, I thought we had stipulated that the taxes were lawfully assessed in the amount shown on the exhibit that has already been introduced.

The Court: You will stipulate to that?

Mr. Blackstone: I have this request at this time, your Honor.

(Testimony of Frank Bostick.)

The Court: You mean we could conclude the evidence at this time in a few minutes?

Mr. Blackstone: I feel so, your Honor.

The Court: Well then, let's do it.

Mr. Blackstone: I have finished with this particular exhibit. I do have one question.

The Court: Ask the question.

Q. (By Mr. Blackstone): If you will look at—let me see if I have this correct here—yes, Defendant's Exhibit A, the chattel mortgage of October 2nd, 1947—you will notice a LeTourneau carryall, serial No. FRS-26269-FP-B, do the records of the Halton Tractor Company indicate what that item of equipment was sold for?

A. That was never taken into our records. [230]

Q. The LeTourneau model FP carryall, serial No. S26270-FP-B, do your records indicate anything about the sale of that piece of equipment?

A. No.

Q. The answer is no? A. No.

Mr. Sharff: Well, Mr. Blackstone, if you want any direct testimony on it I can offer Mr. Halton.

Mr. Blackstone: I am asking this accountant what the records show.

Q. The LeTourneau power control unit, Model TA, serial No. P959-TA, do the records show anything about that piece of equipment?

A. They do not.

Q. Do you have any knowledge about that equipment at all, your own personal knowledge as to what disposition was made of that equipment?

(Testimony of Frank Bostick.)

A. Only hearsay.

Mr. Blackstone: That's all I have.

Mr. Sharff: You can have the hearsay, if you want it.

The Witness: I know what the disposition of it was, as far as that goes.

The Court: Well, you can supply that information by Mr. Halton, can't you?

Mr. Sharff: Mr. Halton can, yes, on redirect examination. [231]

The Court: That is all. Do you have any questions, Mr. Sharff?

Mr. Sharff: Not of Mr. Bostick.

The Court: All right, that is all.

(Witness excused.)

EDWARD H. HALTON

called as a witness in his own behalf, in rebuttal; previously sworn.

Direct Examination

By Mr. Sharff:

Q. Mr. Halton, referring to the Ford pickup and the Chevrolet coupe, how did you dispose of those? A. We drove—

The Court: He has already testified to that. He already testified yesterday that he turned them over to McAuley and McAuley sold them.

Q. (By Mr. Sharff): Well, I don't think that

(Testimony of Edward H. Halton.)

is—what I want to know is this: Did you make a direct transaction with McAuley Motors for so much money for each tractor?

A. Right, for each, for the \$2200.

Q. They didn't act as sales agents and then pay you what they got from the proceeds?

A. Not on a consignment basis, no.

The Court: You sold the cars directly to them?

A. Yes, for \$2200. [232]

The Court: For the amount of money that is involved here?

Q. (By Mr. Sharff): Tell me this, Mr. Halton, do you know what happened to the equipment set forth in the Morris Plan mortgage which was not received and taken into inventory by you?

A. Part of it we never received. And part of it was, I think most of it we didn't receive. Is the one you are referring to—

Q. I am referring to the equipment you didn't have listed in the mortgage. A. Right.

Q. Do you know what happened to it?

A. No.

Q. Do you know if Mr. Watson—well, it would be hearsay as to what happened to it.

A. Yes, sir; that is right.

Q. You never received it?

A. That's right, I didn't receive it.

The Court: Those are those LeTourneau—

The Witness: Power control units.

Mr. Sharff: That is all of Mr. Halton.

Mr. Blackstone: No questions.

Let me see if I understand the situation right here. Assuming, Mr. Blackstone, that we get to the point of where you conclude that these payments of taxes here were made under conditions which would entitle the persons to claim a refund or to claim that the money be paid back to the extent that there was no equity in the taxpayer's—in other words, is there any question that any equity remained on the equipment that Mr. Durston disposed of, as a matter of record here?

Mr. Blackstone: Well, your Honor, that seems to me to present a very different kind of question here as the evidence certainly was—there was no dispute about the evidence that Mr. Durston had no conversations with Reilly; that Reilly dealt solely with Halton. It seems to me that that raises—

The Court: Assume, though, that Halton was acting as his agent.

Mr. Blackstone: I don't want to be placed in the position of having to concede anything. I know your Honor is not putting me in that position now. But I have made no attack upon the figures as testified to by memory from Mr. Durston. I assume that his records would bear them out.

As it turned out, there seemed to be no equity in that property.

The Court: Well, the only reason I asked the question [236] is simply to get some idea of what I want you to discuss in the problem of briefing because it may be that we will have to dispose of this thing in stages; that is, have to determine where you stand and then direct counsel to prepare the

tabulation, and so on, that would be necessary from the evidence to find out what the situation is.

For instance, I see some possibilities here of where—I don't know that it's true—I know that the plaintiff will not concede this, but that you might have different rights under the conditional sales contract than those under the chattel mortgage.

Mr. Sharff: There is that possibility, your Honor. I think, though, that the decisions I could present to the Court of adoptable subrogation may be the difference.

The Court: Well, you may be correct but I am wondering in my own mind whether there may have been any merger or sustaining distinguishment of the Morris Plan obligation or chattel mortgage between Halton and the taxpayer. And that therefore, there is no problem, that therefore the Government lien attaches to the property. Now I don't know if that is so and I haven't checked the law on it.

Mr. Sharff: Well, I have briefly, your Honor, and I have one case squarely in point here.

The Court: You imagine you have or you wouldn't be in court, or at least you think you have. I don't know what [237] position the Government is going to take on it. But it seems to me those questions and those only as to the amounts of money, that comes after determination of that lien question, if we come to it, and the extent to which we come to it. That is the way I see it now.

Mr. Blackstone: I have this point, too, your Honor. I mean, it seems to me, of course, you do

have certain facts here about was there a voluntary agreement. I think that that is a point of the case.

The Court: I am not going to foreclose you. It is a part of the thing I want you to argue. In other words, everything that leads up to the proposition as to whether or not this was first a voluntary payment, if it wasn't, was it a payment made under duress or some sort of pressure, that would come within the section which you rely upon. That is a question I want discussed in all phases of it. I don't want to foreclose you now from arguing that.

Mr. Blackstone: And defer these problems of interest, computation, all of that. I think that would be a reasonable situation.

The Court: And then once I arrive at my conclusion as to what principle applies in that respect and to what property it applies, if you have any differences as to the properties, you may argue that at that time. Then I think that once we arrive at that point, I can direct counsel to [238] first of all attempt to see if they can agree on what calculations—if they can do that, what are the arguable issues and present them to me and I will decide them. It seems to me that is the way it should be decided. I don't want you to argue this other matter until we come to it.

Now what do you want on the time? You are the plaintiff. Do you want to present your issue? I want to get it disposed of while it's as fresh in my mind as possible because, while I have taken rather extensive notes on the matter—particularly on the issues before me first—I still like to do it while it's fresh

in my mind. I have some impressions, I want to keep those impressions fresh. Now what is the situation on time?

Mr. Sharff: I would like to have ten, ten and five if I could get it.

Mr. Blackstone: I will try to comply with that. I have a jury case—

The Court: I know you have a number of cases, Mr. Blackstone, not just this one.

Mr. Blackstone: I will be engaged in trial of the week of the 21st in Sacramento. But I would appreciate perhaps trying to get something done next week. Would that be out of line?

The Court: You could state your theory. You mean you want to file briefs at the same time? [239]

Mr. Blackstone: And then each could answer, perhaps.

Mr. Sharff: It doesn't make any difference to me if you want to do it that way. But I know I go into a jury trial in a few days.
opening briefs.

The Court: I will give you both ten days to file

Mr. Blackstone: Very well. We will try to comply with that, your Honor. If I find—

The Court: And then I will give you five days to make what answer you deem as necessary to each other's briefs.

Mr. Blackstone: Very well.

The Court: And that will put it down for submission when, Mr. Clerk?

The Clerk: April 1st for submission.

Mr. Blackstone: And our first brief is due—
The Court: Is due the 21st?

Mr. Blackstone: The 22nd?

The Court: Or the 22nd. All right, gentlemen, then that will be the order. If you are unable to comply with any briefs in this—if you are unable to comply with the briefing time, consult with one another about extensions and request the Court for extensions. I am not doing it because I want you to ask for an extension, but if you run into problems that you have to make some preparation on, why, rather than doing it on an ex parte order, see if you can't agree with one [240] another on it.

Mr. Sharff: Yes.

The Court: All right, then, that will be the order, and the Court will be at recess.

[Endorsed]: Filed October 29, 1956. [240A]

[Title of District Court and Cause.]

Nos. 32133 and 32134

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled

cases and constitute the record on appeal herein as designated by the attorneys for parties:

In 32133—Civil

Excerpt from Docket Entries

Complaint

Answer

Interrogatories to Halton Tractor Company

Answer to Interrogatories

In 32134—Civil

Excerpt from Docket Entries

Complaint

Answer

Interrogatories to Wes Durston, Inc.

In the Consolidated Case

Memorandum for Judgment

Findings of Fact and Conclusions of Law (In
32133—Civil)

Judgment (In 32133—Civil)

Findings of Fact and Conclusions of Law (In
32134—Civil) ,

Judgment (In 32134—Civil)

Notice of Appeal

Order Extending Time to Docket Appeal

Order Extending Time to Docket Appeal

Appellant's Designation of Record on Appeal

Appellee's Designation of Record on Appeal

Reporter's Transcript of Proceedings, March 9
and 10, 1955.

Plaintiffs' Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

Defendant's Exhibits: A, B, C, D, E, F, G and I.

In Witness Whereof, I have hereunto set my hand
and affixed the seal of said District Court this 24th
day of December, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15396. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Halton Tractor Company, Inc., a Corporation and Wes Durston, Inc., a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: December 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15396

UNITED STATES OF AMERICA,

Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a Corpo-
ration,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

WES DURSTON, INC., a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

The appellant presents the following statement of points on which it intends to rely in these cases:

1. Halton's right to subrogation under the Morris Plan Mortgage cannot be raised in the District Court, because it was not raised in the claim for refund.
2. The facts of record show that the new mortgage given to Halton after notice of lien was filed was a novation.
3. Even if there was no novation, the tax lien of the government is entitled to priority both as to the

amount (\$2,070.00) added in the new mortgage to the amount paid by Halton on the old, and as to \$3,024.10, the proceeds of the sale of items not included in the Morris Plan mortgage.

4. Appellees were volunteers, and, in any event, their agreement to pay the tax if they were permitted to repair and sell at private sale free and clear of federal tax lien, was a binding contract entered into for valuable consideration.

Dated: December 28, 1956.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

By /s/ MARVIN D. MORGENSTEIN,

Asst. United States Attorney,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 28, 1956.